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CONVENTION ISSUE

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ALVIN R. CHRISTOVICH

President, International Association of Insurance Counsel
1952-1953

President's Page

MAY I take this occasion to greet each and every member of our Association; to renew my appreciation of the high confidence reposed in me by electing me your President; and to reassure you of my constant aim to serve you well and thus keep pace with my distinguished predecessors.

Over six hundred members and guests attended our 25th Annual Convention—our Silver Convention—at Lake Placid. In keeping with the fine tradition of our Association a most instructive and enjoyable program was presented, and under Pat Carey's direction our social and entertainment meetings were delightful.

During the administrative year just ended our Association continued to grow in stature, in influence and in accomplishment. This is not accidental. Its roots are planted in the rich soil of individual and collective endeavor, and in the talents of so many of our members who as officers, members of committees, contributors of articles to our Journal, participants in our convention programs, and in varied other capacities, have given so copiously and loyally thereof.

While our by-laws prohibit any official resolution complimenting any officer or member for any services performed, a provision which attests to the spirit of unselfishness which prevails in our ranks, I feel sure I am in order when for myself, and for our members as individuals, I bespeak our thanks to Joseph Spray, our retiring President, to John Kluwin, our Secretary, to Forrest Smith, our Treasurer, to George Yancey, our Journal Editor, and to all the officers and members of committees who have labored so diligently and patiently in our cause during the past year.

Between conventions the work of our Association is carried on by the officers and members of the Executive Committee, and by the officers and members of our standing and special committees. The officers and members of these committees have already been appointed by me and notified of their appointment. Many of the committees have already met at Lake Placid and have formulated plans for the coming year. The Editor advises me that a list of all of these committees will be published in the October issue of the Journal. I make a most earnest request to the officers and members of these committees to timely conclude their work so that the benefit thereof can be timely given to our entire membership through the publication of their reports in the Journal.

Since the Journal is such an important adjunct to our Association, without which our effectiveness is stifled, I earnestly request our membership to liberally contribute thereto articles which can be of so much help to our fellow members. Our Editor has done a fine service in keeping it on a high plane, and will welcome your contribution.

This will be an important year for our Association. Within the framework of the purposes for which it was formed, we can make a definite contribution to our client insurance companies and to our own membership. Your officers and your executive committee shall remain alert to any problems which are now affecting, or which may hereafter affect, that interest.

ALVIN R. CHRISTOVICH, *President.*

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1952-1953

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

Quebec Convention

AS WAS announced at Lake Placid, the 1953 Convention of the Association will be held at the Chateau Frontenac Hotel, in the City of Quebec.

President Christovich and Secretary Kluwin visited Quebec after the Lake Placid meeting for the special purpose of appraising all of the requirements necessary for a meeting such as ours, both as to the Chateau proper, and the city and environs, and making preliminary arrangements.

They report that in their opinion our membership will be delighted with Quebec, the Chateau, the Saguenay River trip, and everything which a visit to that spot will unfold. All the necessary requirements for a wonderful convention are present.

The dates will be June 29 and 30 and July 1, 1953. However, Secretary Kluwin will advise you by special letter on or about October 1, as to all details relative to making reservations, etc. No requests for reservations can be honored before then, and it is earnestly requested that you make no attempt to secure reservations until the receipt of Secretary Kluwin's letter.

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PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor*
ELEVENTH FLOOR, COMER BUILDING
BIRMINGHAM, ALABAMA

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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JOHN A. LUHN

John A. Luhn died on June 28, 1952. For many years John Luhn was Vice-president of Fidelity & Deposit Company of Maryland, and, during the early years of this Association, was active in the work of the Association and is one of the early members who was responsible for steering this Association on a course which produced the great organization we have today. His many friends in this organization deeply regret his passing.

* * *

OPEN FORUM

The Open Forum Proceedings, and addresses, will be featured in the October issue of The Journal.

PROCEEDINGS

25th Annual Convention International Association of Insurance Counsel

LAKE PLACID CLUB,
ESSEX COUNTY, NEW YORK

JUNE 18, 19 AND 20, 1952

WEDNESDAY MORNING SESSION
June 18, 1952

The 25th Annual Convention of International Association of Insurance Counsel convened in the Lake Placid Club, Essex County, New York, on June 18, 1952, at nine-thirty o'clock, Mr. Joseph A. Spray, president of the Association, presiding.

PRESIDENT SPRAY: Members and Guests: This is the 25th Annual Meeting of the Association.

SECRETARY JOHN A. KLUWIN: Mr. President, I hesitate to interrupt, but I rise to a point of order. So far as I know, you have no indication of your authority here to preside over this session, so I'll call upon one of our Past Presidents, Mr. Grubb, to properly instruct you.

PRESIDENT SPRAY: Come forward, Ken. (Applause).

MR. KENNETH P. GRUBB (Milwaukee, Wis.): Joe, it's a pleasure and a privilege on behalf of the Association to present you with this badge of authority. I want to say two things to you. I hope you're more successful in using it than some of your predecessors; and second, when you get back to Los Angeles, don't take it home, leave it in the office. (Applause).

PRESIDENT SPRAY: Thank you, Ken.

This is the first time that we've ever met in this beautiful spot and from the reservations that have been made, it looks like we're going to have one of the biggest meetings that we've ever had.

The first item on the program is the reading of the Minutes of the previous meeting and the Chair would gladly entertain a motion to waive the reading of these Minutes as I believe they have been published, have they not, John?

SECRETARY KLUWIN: Yes.

MR. JOHN L. BARTON (Omaha, Neb.): I so move.

MR. ALVIN R. CHRISTOVICH (New Orleans, La.): I second the motion.

PRESIDENT SPRAY: If there is no objection, it is so ordered.

It is with great pleasure, members of the Association and Friends, that I present to you our good friend, the Superintendent of Insurance of the State of New York, Alfred Bohlinger. (Applause).

Address of Welcome

ALFRED BOHLINGER
Albany, New York

AT the outset, I do want to extend to you a very hearty welcome to the Empire State. I understand that this is the first time that your Association has met within the borders of the State of New York at your Annual Convention. We are very proud of our State of New York and while I am not a native of Lake Placid, I am a native of New York City. I am particularly fond of Lake Placid and I know that the longer you are here, the better you will like it.

I glanced at your program this morning and I see that among other things you

have Skeet Shooting at dawn and pre-dawn fishing parties. Now, as a former practicing lawyer, I am wondering how you are going to get the Fra-men out at any hour before 10 o'clock. I think the attendance here may be some indication. I know at home whenever I try to get hold of a lawyer, my secretary reports that he is in court. This is usually around 11 o'clock, and recently I said to her, "Don't you know that lawyers send their clerks to answer the calendars?"

In any event, I know that you're all going to have a good time. I didn't quite know what my remarks should consist of, and last evening there was a little discussion and a suggestion originated that there be an added item put on the agenda and I know that you will welcome it. I am certainly not presumptuous enough to suggest what you should have on your agenda, but inevitably the question of fees of lawyers came into the discussion and someone said, talking to me and thinking of me in terms I suppose of a regulator who is always looking for more power, but I think that the commissioners ought to regulate the fees of the defense attorneys. (Applause). So that prompts me to suggest that you add to your agenda a debate on the question of: Should attorneys' fees be fixed by commissioners? And I commend to you for the affirmative Ray Caverly and in opposition I am told that arrangements will be made for a desk for special registration for those in opposition.

It is interesting to note that the opening item of your discussion concerns the matter of the High Jury Verdicts and that is a question which concerns not only you but concerns supervisory officials. We have been giving a great deal of thought to that particular problem because of its impact on the underwriting experience, on the rate making procedures, and the other aspects of State supervision. I look forward with great interest to sitting in at that forum and I am sure that I will take something away with me that will be of benefit to myself. In conclusion, I want to tell you how happy I am to be with you and again to say to you, have a good time at beautiful Lake Placid. Thank you. (Applause).

PRESIDENT SPRAY: Thank you, Mr. Bohlinger. I'm sure we're doubly welcome now. We greatly appreciate your having come down here to welcome us to the State of New York and I think from the number that are registered, you're living up to your reputation of being the Empire State.

Our next speaker, Mr. Henry Nichols, has been an active member of this Association for many years. He is Vice-President and General Counsel of the National Surety Corporation of New York. Mr. Nichols will respond to the Address of Welcome by Mr. Bohlinger.

Response to Address of Welcome

HENRY W. NICHOLS
New York, N. Y.

IT'S been 15 years since I've had the honor and privilege of occupying this rostrum. They have been fifteen terrifically and terribly interesting years for this country and for the insurance business. It's rather a challenge to take the opportunity to discuss some of the very serious things that are so close to our hearts these days, we have two speakers coming on this program that can do that much better than I, I feel certain, so I will not attempt to be too serious so early in the morning.

I did prepare a serious address not so very long ago and delivered it out in John Barton's home town of Omaha. John was kind enough to come down and take me to breakfast the day that I gave the speech. I think he wanted to look me over and feel my pulse, but then he stayed for the address and later on I went over and visited John's office and met his partners and now I understand why he is so successful in practicing law. But before I delivered that speech I tried it out on Bert and our oldest daughter who is also in the insurance business, and like so many of our insurance wives, she is always telling her husband how he should run the business, but I tried this speech out on them and Carolyn said to me: "Dad, why do you

have to be so serious? Couldn't you be a little comical?"

I said, "Comical, do you want me to dress in a clown suit?"

She said, "No, not that, couldn't you just be a little funny?"

Whereupon her mother spoke up and said, "Oh, stop, let your Dad alone. If he's just natural, he'll be funny enough." (Laughter).

Another reason I thought I was going to respond to this address, another reason that I didn't prepare anything at length is that I did not know how long our good Superintendent would speak or was going to speak. It's customary as some of you know for the outgoing Chairman of the Insurance Section of the American Bar Association to give the response to the Address of Welcome the year after he has been in office. I think that's to prevent the crowd from forgetting him too soon. As someone has said, "There is no one quite as 'ex' as an ex-President or an ex-Chairman, and I think that is so. One day he's cock of the barnyard and the next day he's a feather-duster.

This duty fell to me in the American Bar Association of 1949 in St. Louis and I prepared a few worthy comments at that time and the Missouri dignitary that got up to welcome the Insurance Section to St. Louis said just about this: "We cordially welcome you to St. Louis," and then sat down. That threw me again. I didn't have time enough to think of a shorter speech than that so as I got up and unlimbered my prepared comments, I felt very much like a wart on the nose, something quite conspicuous but entirely unnecessary.

Wherever you are from, I am sure that you all feel as I do, that it is a warming experience to be welcomed among kind hearts and gentle people here in the beautiful upper regions of the Empire State by our Superintendent of Insurance, Alfred Bohlinger. It was Theodore Roosevelt who said that "Every man owes part of his time to the building up of the industry or the profession of which he is a part." Every one of the insurance lawyers in this Association who is here I feel certain wishes to contribute something to his profession and to the insurance industry. In this we have not been lacking in the past and I feel certain we shall not be lacking in the future. To be a little more specific in response to the welcome by Superintendent Bohlinger that we have received, I would like to tell you that in New York we are proud of Al as our Superintendent of Insurance. He is a man who was selected by Governor Dewey out of the Insurance Department to be its Superintendent. He is a career man recognized for capable endeavors and long hard work. Al Bohlinger came up the hard way. He was a lawyer before he became an Insurance Department official. He likes to remind us every once in a while that he is still a member of the New York Bar. If any of you have brought eligible daughters with you to the Convention, you might keep an eye on Al, for as to character, ability, and geniality, we consider him a most eligible bachelor. We thank him for being here, but we are here both to have fun and for some serious reflections about matters pertaining to our industry. The insurance business has had a magnificent part in the social and economic development of these United States. No industrial or social history of this country could be written without showing how insurance has made it possible for our people to challenge our future without the loss of personal independence. The insurance industry has a great stake in the private competitive system of this country. A free academy like a free people is a necessity if we would keep this country what it has been made by freedom, the strongest on the globe. In recent years social planners have succeeded in building, in bringing about a steady encroachment of government into the field of insurance. A few weeks ago President Truman asked Congress to set up a system of Federal Damage Insurance. It is understood that under his idea this insurance would be self supporting through reasonable premium payments by the insurers. In theory on any such basis the private companies should be able to write this insurance. As a fact of the matter, this insurance probably can't be written on a self sustaining insurance basis at all. However that may be, the President's message is a reminder that our Federal Government is already in the insurance business on a scale that is not understood by people generally.

A recent publication of the New York Tax Foundation quotes estimates of Federal Insurance in force at 325 billions of dollars as of the end of 1952 as compared with only 252 billions two years earlier. These figures do not include unemploy-

ment compensation liability. The most amazing anomaly of our social and economic history is the meekness with which the American people have watched bureaucratic control founded upon the private business of this country including the insurance business. They do not mean to surrender their liberty. They do not mean to be indifferent. The trouble is that freedom has been so much a part of our lives that people take it for granted. They do not realize that a militant stand must be taken against dangerous trends that would destroy us. Part of your job and mine is to help promote this great business of insurance so that favorable public opinion will be deserved by the companies which we serve. It is part of our job, too, to promote a wider and more sympathetic understanding of private insurance. If the importance and fine integrity of the insurance business is understood by our people in all our respective communities, then we will not need to fear the absorption of insurance by a socialistic government. What you may contribute in this direction will be of benefit not only to insurance, but to all free competitive enterprise in the United States. If state socialism ever gains control in this country, the insurance business will be one of the first free enterprises to go. This year may be one of the most important years in the history of the insurance business in the United States. A very great deal depends on what happens next November and I would like to leave with you the parting thought that no man elected to the Presidency in November, whether he be your choice or mine, can alone stop the dangerous trend toward social insurance and socialism generally in this country. He will need the support of a Congress doing the will of a thinking and determined America. That includes you and me and Superintendent Bohlinger. As for the good Superintendent, I feel certain he will do his part to support private competitive industry so long as private industry strives to equitably meet the requirements of the public.

PRESIDENT SPRAY: Thank you, Mr. Nichols.

The next matter on the agenda is Introduction of New Members. Is Frank O'Kelley here?

MR. A. FRANK O'KELLEY (Tallahassee, Florida) Chairman, Reception Committee for New Members: President Spray, the Association has been stimulated within the past year by the addition of several new members and I should like to present to the group at this time those who are present this morning. I'd like to call on two members of our Committee to come down to assist me please, Mr. Bronson and Mr. Gooch. Will the New Members please come forward as I call your names.

Gordon R. Close
Richard S. Gibbs
V. C. Enteman
Paul C. Gouldin
Lee H. Kramer
Burnham M. Fisk
Charles D. Hurt
George N. Mecham
Troward G. Wells
Allan P. Gowan
Reese Hubbard
Mertin H. Giffin
J. Toll Underwood
Norman C. Skogstad
Edward F. McLaughlin
Sumner Canary
Fred M. Mock
Paul Wagner
(Applause)

Gentlemen, I would like now to introduce these men to you one at a time so you can better recognize them. You will notice that each man wears the distinctive green badge so that he can be identified, and so that you can become better acquainted with each man present.

First let me present Mr. Paul Wagner from East St. Louis, Illinois.

Mr. Skogstad from Milwaukee, Wis.

Mr. Reese Hubbard from Chicago, Ill.

Mr. George Mecham, Omaha, Neb.

Mr. Charles Hurt, our old friend from Atlanta, Ga.

Mr. Edward McLaughlin from Syracuse, N. Y.

Mr. Bob Enteman from Newark, N. J.

Mr. Mert Giffin from Milwaukee, Wis.

Mr. Dick Gibbs from Milwaukee, Wis.

Mr. Lee Kramer, Columbus, Ohio.

Mr. Gordon Close from Chicago, Ill.

Gentlemen, we welcome you into this association.

Thank you, Mr. Spray. (Applause).

MR. SPRAY: I would like also to welcome you new members into this Association. I'm sure that you will never regret having joined this group. In it you will find not only good fellowship but you will

find some of the best lawyers in the United States. Like any other association, what you get out of it will be in like proportion to what you give. I therefore sincerely hope that you will take an active part in the work of our organization and give.

Now, a word to you new members who are practicing lawyers. When you run onto a home office counsel, here at the Convention, don't shy away from him. I think that you will find them exceptionally good fellows.

Report of President

JOSEPH A. SPRAY
Los Angeles, California

THE most popular subject today in the insurance world is high verdicts. We are all naturally concerned with this subject because it is our bread and butter and we know if the present trend continues private insurance is going to be faced with bankruptcy or have to continue to raise rates to remain solvent. The result will be either the private insurance industry will go out of business in favor of state subsidized automobile insurance or rates become so high that the average person cannot afford to carry public liability insurance.

You gentlemen know that it is not easy to raise rates on account of regulatory laws and "pressure groups." These groups claim the reason the companies are losing money is not because of high verdicts but due to the high salaries of executives—to high reserves and point to large surpluses. These groups are very kind to the adjusters and us trial lawyers. They deal directly with us.

We find, and I now quote statistics from Pat Taylor's Jury Service, Los Angeles, California, which Charley Gould and I have compiled over the past several years that in 1940 the highest verdict awarded was: $33,000.00.

1941	$37,500.00
1942	still not available
1943	77,600.00
1944	66,500.00
1945	82,524.00
1946	97,500.00
1947	100,000.00
1948	70,000.00
1949	54,955.00
1950	156,937.00
1951	185,143.09

Thus we see with the exception of the two years immediately preceding the Korean situation (not war) that the amounts of verdicts have consistently increased from $33,000 to a high of $185,143. From the hue and cry that I hear throughout the country these figures must be representative. We here are concerned with this situation. Is it due to NACCA? To inflation? To increased costs including labor turnover? Or to inadequate rates?

There is a concerted effort being made by a national association of plaintiffs' lawyers to educate their members in law, medicine, trial tactics, so that they may better represent their clients in personal injury claims and litigation. I refer, of course, to NACCA—National Association of Compensation Claimants' Attorneys. Surely we have no objection to any association with such high and lofty ideals. By such education and association they seek to increase the amount of jury awards. As Mr. Belli says: Secure an "adequate award." Our ideas, however, seem to differ as to what is an "adequate award," and what "methods" should be used to obtain the same. I know many members of this association have attended some of the many meetings held by NACCA throughout the United States. Perhaps some of you have gone away with the same feelings that I have—admiration, concern and apprehension for some of the tactics recommended. You members of the home office take notice that these gentlemen know their business and they are passing along their knowledge and skill to the lawyers throughout the country. They are obtaining results. Furthermore, they are arousing public interest in what they call "adequate awards" but what we call excessive awards. They are sending out speakers from members of their association to clubs and university and college groups to spread the gospel of "adequate award" and recommending to their listeners that they protect them-

selves against the "adequate award" by increasing their policy limits. To hear some of these speakers talk you would think that insurance companies object to fair and adequate compensation. This you and I know is not the case at all. You would be made to believe that no insurance company ever made a fair settlement of a claim or in fact ever settled without being forced to do so by litigation. At a meeting of a law fraternity of the University of California held in San Francisco last year Mr. Belli spoke to the group about the "adequate award" and insurance companies in general. After the meeting some of the law school students remarked: "I sure would never represent an insurance company." Incredible—yes, to us who know that most of our casualty claims are settled directly with claimants and that the number of dissatisfied claimants who seek to set aside the settlements is insignificant. Yes, we, the trial lawyers, particularly know, that the companies are not in the business of litigation. Their business is to pay legitimate claims fully and fairly and they do so with few execptions. We know they have no objection to adequate awards. The insurance companies' objections are to excessive awards, the result of passion, prejudice and build-ups.

Inflation has reduced the purchasing power of the dollar to less than 50% and there doesn't seem to be any end in sight. However, we all know that what goes up must come down. You can't keep lifting yourself up by your bootstraps forever. The new deal in truth and in fact was nothing new at all. It was tried in Greece in 300 B. C., in Rome in the fourth century and in France in the eighteenth century, and, I might add, failed miserably in the end.

However, we are not here to discuss politics but the insurance industry. Can you wonder that verdicts have increased when every juror knows that where you used to pay 10 cents for a loaf of bread you now pay at least 23 cents. Do you wonder that jurors are liberal with other people's money when they read in the papers everyday about millions and billions being given away—millions spent to keep prices down and millions to keep them up? It is only natural under these circumstances that they begin to think in big figures. It is to be expected that when people are given something for nothing that they in turn become generous with other people's money. This is all especially true of the average citizen who serves on juries. He looks upon an insurance company as he does upon the United States treasury—an inexhaustible fund. I have even known of preachers who consider insurance companies legitimate prey.

Aside from the ordinary increase in costs of doing business, with which we are all familiar, there are the hidden costs like hidden taxes. Among the principal hidden cost is the turn-over in labor. This "turn-over" is costing the insurance industry millions of dollars a day. It is due in part, of course, to the war industry which pirates labor at government expense. It is likewise due to the social reformers and I am now referring to unemployment insurance. Do not misunderstand me. I am in favor of unemployment insurance but I do strenuously object to the way the unemployment insurance fund is being administered. The purpose of the unemployment act was to secure the employee in time of need when he was out of work. But the act is not so administered. Recently one of our young employees gave notice that she was getting married and was not going to continue work after marriage. That she was going to live in Long Beach, a city located about 25 miles from our office. Her last day was on a Saturday. The girls in the office gave her a bridal shower, I gave her a check as we were all wishing her much happiness. What a sucker? She left our office shortly after noon and must have gone directly to the unemployment insurance office because the first thing Monday morning we received notice she had applied for unemployment insurance. Her grounds were "she had moved to Long Beach and it was too far to commute." Although we had ample evidence that she quit because she was getting married and did not intend to resume work she was nevertheless awarded unemployment benefits. This is only one of the many abuses.

Thus we see everyday that people are receiving something for nothing and now not only expect it, but demand it. You can't, however, always blame the employee. Often the money is practically forced upon them by enthusiastic employees of the government.

You company officials are most familiar with the difficulty of getting a fair premium for the risk assumed, but let us acquaint the public with the fact that the

so called adequate award calls for an adequate premium and that they are the ones who are going to pay. The present rates are entirely inadequate for the reasons heretofore stated. They are also inadequate because they were set before the advent of the unwelcome partner in the business. When I refer to the unwelcome partner I mean the U. S. taxing authorities who take their share of the income but will have no part of the losses. Mr. Gordon Snow will give you some rate statistics at the open forum.

We are all familiar with these problems that face the insurance industry but the question is "Does the public know about them?" I respectfully submit that they do not and with few exceptions no concerted effort is being made by the insurance companies in general to acquaint the public. It is a long range program but it can be done and will have to be done if the industry is to survive. "Public interest" must be aroused and this, in my humble opinion, can only be done by showing, not telling, the public that they are footing the bill. It is easy for jurors to give somebody else's money away but when they know it comes out of their own pockets that is a different story. Our legislature and courts in California have taken notice of the tendency of jurors to give unusually small verdicts in condemnation suits. Consequently a change of place of trial is allowed as a matter of right in such actions where a city or county is plaintiff. The state highway department of the state of California has been condemning property for our freeway system in Los Angeles. In the great majority of the cases tried the property owner has received no more and often less than what was offered in settlement before suit. The answer is obvious: The jurors are not giving someone else's money away.

I, therefore, recommend that the various insurance companies through their associations get together and make a concerted effort to educate the public that they are the ones who are paying. It is respectfully suggested that speakers be sent out to various clubs, associations and universities to acquaint the public of this fact. That the companies use newspaper advertising and thereby secure the cooperation of the newspapers in telling the public about the cases that are won by the insurance companies as well as those that are won by the plaintiffs. Human interest stories will get the public interest. I am not unmindful of the fact that some insurance companies and associations are attempting to explain the increase in rates to their policyholders. This, in my opinion, while helpful, is not the answer to our problem. The public in general have become accustomed to increase in the price of every commodity. They seem to take it as a matter of course. It takes more than the home office to arouse public interest. It requires the help and support of everyone connected with the industry, particularly the field adjuster who is in contact with the public. In my opinion a field adjuster can do more to build-up good will than anyone else connected with the industry. On the contrary, he can do more harm because of his close contact with the public. I know one adjuster who got in an argument with one of our most prominent surgeons in Los Angeles over a $7.50 item on a $150.00 collision loss. The adjuster finally paid but in the meantime made the doctor so unfriendly towards all insurance companies that I had a great deal of difficulty to get him to examine and testify in a very important case. You and I know it is not always the adjuster's fault. I recall a letter recently written by a doctor. It read in substance: "I am returning herewith your draft in the amount of $10.00 in payment of first aid rendered to your assured, Mr. McGillicuddy. I didn't know this was an insurance case so I am enclosing a corrected bill in the amount of $25.00." This is the feeling in general of the public which has been created by wild cat companies and fine print in the policies and is what has to be overcome.

It is suggested this problem be given special study by a committee. That the advice of experts in the field of public relations and advertising be sought and that the committee report to us the best way public interest may be aroused.

PRESIDENT SPRAY: Our next speaker has had a wide experience in the insurance business. He is a graduate of the University of Michigan. He was formerly connected with the Globe Indemnity Company, the Michigan Mutual Liability Company, and the Continental Casualty Company. In the latter company he was assistant to the president Herman Burns. He is a newspaper reporter and a columnist. In 1945, he became manager of the

Insurance Department of the United States Chamber of Commerce, which position he now holds.

It gives me great pleasure to introduce to you Mr. A. L. Kirkpatrick who will speak to you on the subject "Will Government Assume the Risks of Life."

(Applause).

Will Government Assume the Risks of Life?

A. L. KIRKPATRICK
Manager Insurance Department
Chamber of Commerce of the United States
Washington, D. C.

I AM very happy to have this opportunity to talk to you here today and to tell you a little bit about some of the things that are going on in Washington as we see them in the Chamber of Commerce of the United States.

I have learned, through the years, to have a great deal of respect for the legal counsel of the insurance business. You men are the experts of the insurance business in the field of administrative law as well as in the more routine law of contracts, agency and torts with which insurance companies deal in their daily work.

I would like to emphasize that point because there is going on today, before our very eyes, a great struggle between the doctrines of government by law and government by men. The growth in size and complexity of government has made the field of administrative law one of the most important branches of the legal profession. In that field, as well as the older traditional branches of insurance law, you men are the main line of defense as far as the insurance business is concerned.

I want to speak briefly today about some of the federal government's insurance acitvities which, when put together, show a pretty clear pattern of drift toward more and more government performance of the function of an insurer in providing the loss-spreading or reserve accumulation techniques which are the heart of private property insurance and of life and annuity insurance.

There are some people who believe that it is a proper function of government to assume the risks of life which confront individuals and businesses. But they have not given much thought to the fact that the underwriter of risks must have the right to prescribe the terms of the underwriting. And when the underwriter has the power of the government, there is an inevitable surrender of individual freedom which many of us believe is far more dangerous than the original hazard.

But, before I get into that subject, I want to take just a moment to talk about the Chamber of Commerce of the United States—what it is—how it operates, and particularly how it affects the insurance business.

The United States Chamber

The Chamber is a unique organization. There is nothing else like it anywhere in the country. It is unique in many ways, including its organizational set-up, its method of operation and the problems with which it deals.

The Chamber has two classes of membership. Its voting membership is made up of more than 2500 local chambers of commerce and also more than 700 national trade associations. These 3200 organizations, with an underlying membership of more than 1,500,000 businessmen, are the only ones which vote. They elect the Board of Directors and establish Chamber policy. So you see, the National Chamber is really a federation of business organizations.

Practically all of the national insurance trade associations are included in this membership. There are 26 member insurance trade associations altogether. These include the National Board of Fire Underwriters, Associations of Casualty and Surety Companies, American Mutual Alliance, American Life Convention, National Association of Insurance Agents, National Association of Mutual Insurance Agents, National Association of Life Underwriters, etc.

The second class of Chamber members consists of some 21,000 corporations and

individuals. Practically all of the leading insurance companies of every class—life, fire, casualty, stock, mutual and reciprocal —are members, more than 500 of them. The insurance business is one of the staunchest supporters of the Chamber in its activities.

So much for the membership structure.

What does the Chamber do?

Primarily, it is a policy-making organization. It deals with all of the major national economic and social issues which are before the country. We seek to develop the facts about each particular problem, disseminate this information among our members, get a concentration of opinion and then formulate that opinion as a declaration of policy.

Once this policy has been established by the vote of our members, then the next step is to endeavor to have this policy adopted as the policy of the country. That means a process of public education through speeches, pamphlets, newspaper stories, radio and television programs, public debates and sometimes testimony before Congressional committees and other Congressional contacts.

I like to summarize the Chamber's objective by saying that its purpose is to promote and defend our American way of life —our economic and social structure. The Chamber is concerned with maintaining the greatest possible freedom for the individual. We seek to protect our system in which the individual is free to use his own initiative and resourcefulness, make his own decisions and receive the reward for his own efforts.

This means a minimum of government regulation and interference with business and with the private lives of individuals. And even that regulation should conform to sound principles and be based upon statutory authority, rather than the discretion of bureaucratic employees.

Basically, the Chamber is departmentalized according to lines of industry, such as insurance, natural resources, agriculture, manufacture, finance, etc.

Our current program of objectives consists of six major fields which have been designated by the Board of Directors for concentrated attention. These are: (1) Social Security, the Welfare State and the drift toward socialism; (2) federal taxes; (3) government economy and anti-inflation; (4) labor relations; (5) foreign policy; and (6) the broad field of better public understanding of our economic and business system—what it is and how it functions.

Now I want to speak just a moment about where the Insurance Department fits into the Chamber picture.

It performs two functions. One is to deal with those insurance problems which are national in character and basic to our economy. Among these are Public Regulation of the Insurance Business; Proposals for Socialized Medicine; Government Competition or Monopoly in any Phase of Insurance; Discrimination by Foreign Government Against United States Insurance Companies, etc.

The Insurance Department conducts the Hemispheric Insurance Conference, which will hold its fourth plenary session in New York in September. We also sponsor the National Fire Waste Council which, in turn, conducts the Inter-Chamber National Fire Waste Contest.

In general, the Department serves as a research, a policy-making and a publicity organization.

This is one of its functions.

Its other purpose is to act as the link between the insurance business and the over-all operation of the Chamber. The insurance business has a tremendous stake in maintaining a sound and smoothly working economy, in holding down government expenditures, a balanced budget; a fair distribution of the tax load with tax rates which do not stifle initiative; in a just and workable labor relations policy; a wise foreign policy; and in a general public understanding of the fundamentals of our economic system.

The Chamber offers the opportunity for the insurance business to join with all other lines of business in formulating a unified policy and speaking a single voice.

Six insurance men are members of the Chamber's Board of Directors, one of them is its President this year. Twenty-three insurance men hold 17 memberships on 13 policymaking committees. They come from all branches of the business. Under the guidance of the Insurance Committee and the staff they bring insurance into every operation of the Chamber.

At the last meeting of the Insurance Commitete a new program was launched to bring the insurance business even more actively into Chamber affairs.

It has hardly gotten into operation, but I'll give you one example of how it works.

The Chamber has taken a leadership role in demanding a balanced federal budget for the year commencing July 1. That would mean either more taxes or a cut of more than $14 billions in President Truman's budget.

The Chamber's Board of Directors elected the second method and President Hulcy sent a letter to every member of Congress pointing out where the cuts should be made in the $85 billion budget and demanding that Congress not appropriate more money than it could see coming in and without increasing taxes.

The Health and Accident Underwriters Conference expressed a willingness and a desire to pitch in and help. It sent copies of President Hulcy's letter to its 190 members asking them to talk to their Senators and Representatives. Later the Conference sent two more Chamber government economy messages to its members.

Now, I don't need to tell you that many insurance men are pretty influential citizens in their communities and their judgment is often welcomed by their Congressmen.

Well, so far, Congress has stood its ground in a wonderful manner against the cry to spend more and more. I'm sure what the insurance men have done has helped.

But that is only a start and on only a single issue. You are going to hear much more about this activity of the Insurance Department in the months and years ahead.

Automobile Liability Insurance

Now I want to speak for a moment about the situation which has developed in the field of automobile liability and property damage insurance as I see it from the standpoint of one who is relatively disassociated from the insurance business, yet closely allied with it.

The insurance business is being made the victim of causes which are largely beyond its control and which, individually and in the aggregate, constitute a national problem.

Probably the most important factor in the rise which has taken place in loss costs is inflation, or to put it another way, the depreciation in the value of the dollar which is used as the measure of loss cost.

Other causes which have contributed in large measure, of course, are the rising accident frequency and the more skillful techniques of the claimants' attorneys. And in the face of rising costs, the complexities of public regulation of rates plus the natural buyer resistance to higher prices, has tended to delay the process of trying to keep income abreast of outgo.

Now, it would be a national calamity if this situation were to be allowed to go on to the point where any substantial portion of our fine automobile-writing insurance companies were to be allowed to be liquidated. Such an event would almost certainly bring further government entry into the business in some form.

The insurance companies have done a wonderful job and have shown great ingenuity in devising forms of automobile insurance protection and equitable rating plans in a highly competitive and unusually complicated field. They have spent millions of dollars and have played a leading role in the education of drivers, law enforecement officials and highway engineers, all directed at the rising accident trend.

But they have largely neglected the most potent single force which is working against them, namely, the inflationary pressures in our economy. It is time for them to join with the other businessmen of the country in a concerted defense against this force.

Every military commander knows the danger of having his force *outflanked* by the enemy. He knows that any amount of strength in his main line of defense may be rendered worthless if his *flanks* are not protected. The French army learned that lesson when their supposedly-impregnable Maginot line was virtually wiped out overnight by Hitler's swift-moving armored division which ran around its flanks.

The casualty insurance companies are being outflanked. They have built a magnificent Maginot line in their great financial strength, their skillful underwriting and claim techniques and in their broader public relations aspects of public safety education.

But they have been outflanked by the more nebulous and silently moving forces of inflation.

The defense against these forces can only be successful when the defending troops are so unified that their flanks cannot be turned.

The forces of inflation stem to a very large extent from the policies of our federal government. Ellis Arnall, the Price

Administrator, said recently in Washington that a little inflation *is a good thing.* But he didn't say who it is good for. I doubt that the casualty insurance companies can agree with that assertion.

The Chamber of Commerce of the United States is the organization of all business. It has a complete program of defense against inflation in its efforts with regard to the government's spending policy, tax and debt management policies, and also in regard to good labor relations and social legislation. This defense of business could be measurably strengthened by the more active cooperation of the casualty insurance companies of the country.

Their position, in turn, would be made much more tenable by the active support of the businessmen of the country as represented in the National Chamber.

The time has long passed when it is enough for a single company merely to do a good job of managing its affairs, or even to do that, plus carrying its share of the burden for maintaining high standards and sound practices in its industry.

Today the whole private competitive system is under attack and businessmen if they want to survive, have got to join hands, in the common defense at those points which affect all business alike, but none specifically, and which are, therefore, largely ignored or neglected by single companies or single industries. Failing to unite, single industries will be outflanked and perhaps lost or seriously hurt.

The Drift Toward Socialization

Now I want to speak, in the time remaining to me, about the part insurance is playing in the current drift toward socialization of business in the United States. Will government assume the risks of life by the socialization of insurance?

Let me say at the outset that if by "socialization" you visualize an act of Congress by which the Federal Government would take over the ownership and control of some or all of the private insurance companies, perhaps issuing government bonds in payment for them, then I think the answer to the question must be "No."

But if by "socialization" you mean the continued expansion of the Federal Government, or a combination of federal and state governments, into the use of insurance techniques combined with subsidies, then I think the answer to the question must be that "socilization is not only under way, but is already well advanced and is progressing at an alarming rate."

That answer may come as somewhat of a surprise to you because nearly every insurance company—fire, casualty and life—is now handling about all the business its facilities permit.

All of us are so preoccupied these days with the pressure of problems demanding immediate solution that we have had little time to take a long-range look at some of the things that are going on outside of our immediate business until they reach a point where they affect our pocketbooks or our company balance sheets.

Commodity Credit Corporation

You may already be familiar with the insurance technique of the Commodity Credit Corporation. The Corporation's loan agreement with its farmer borrowers provides that in the event the commodity, which is stored on the farm and pledged as collateral for the loan, should be destroyed by fire, the Corporation will cancel the loan. This is fire insurance even though no policy is issued, as such, and no premium paid.

Economic Cooperation Administration

The Economic Cooperation Administration, now called the Mutual Security Administration, has been using a similar technique in connection with marine insurance on shipments abroad financed by its loans. It works like this:

The MSA makes dollars available to a foreign government, which, in turn, makes them available to its importers. The importers use the money to buy goods in this country and to pay for them. The foreign purchaser is able to control the placing of the insurance and it has been common practice to make sure it was placed in their domestic companies, leaving United States companies out completely.

The policy, of course, is written in the currency of that country and, in the event a shipment is lost, the foreign insurance company pays the loss in the same currency. That puts the foreign purchaser and his government right back where they started, without the goods and without the dollars to repurchase them.

The MSA technique meets that need. At the next quarterly allocation of funds it allows that country enough additional

dollars to cover the loss and charges the extra allocation against the overall program. This means simply that the MSA spreads the losses of the few over the many. That is "insurance" by definition. And without the MSA performing that insurance operation, the foreign governments and their insurance companies would not have been able to force the United States marine insurance companies out of that market.

I have mentioned two examples of government use of the insurance mechanism. Where does that kind of government thinking and planning lead us? Let's take a look ahead.

Government Defense Purchases on a Cost-Plus Basis

The Department of Defense is now spending at the rate of about $50 billion a year. A large part of these billions is to pay for materials purchased on a cost-plus basis in which the Government reimburses the contractor for specified insurance costs according to a predetermined formula. Does it require much imagination to visualize the thinking of the Commodity Credit Corporation and the ECA invading the Department of Defense? In that case the Government might well say to the contractor, "You do not need to buy any property insurance on the materials you are processing for us. In the event of a loss we will reimburse you and spread the cost over our entire production program."

The same technique might be applied to workmen's compensation, public liability and automobile insurance, at least in the case of contractors who are working full time for the Government.

Proposed National Valuation and Classification of Property

Let's look at another proposal which is actually before Congress, although I am happy to say, apparently dormant. It is the "War Disaster Act of 1951"—S. 1848. Title III of the bill, under the heading, "Property Indemnity" provides for the creation of a War Damage Administration and adds:

> "Immediately upon the organization of the Administration, the Administrator (1) may encourage and assist states and localities in classifying and providing for the preservation of adequate records on *costs, values* and *ownership*, and shall perform such functions himself when they would not otherwise be performed, and (2) he shall prepare for distribution, if and when required, appropriate claim forms with accompanying instructions. . . . "

If this bill should be passed and this provision carried out, the Federal Government would have a uniform record and classification of the values and ownership of all the real and personal property in the country.

With that information, it would be a relatively simple thing for the Government to pay not only war losses, but also peacetime losses caused by fire, windstorm and other named perils.

Our government has, for years, been advancing its socialistic program on the excuse of necessity created by some crisis.

Does it require much imagination to visualize the government using all of that data to spread the losses by fire and other perils over its entire budget, thereby eliminating the private insurance companies and their entire sales and field forces? After all, what is a mere $700 million of annual fire loss to a government whose current budget totals $85 billion a year?

Government Insurance of Hazards Insurable by Private Companies

The government is gradually gaining experience in insurance underwriting by insuring hazards which private companies cannot handle.

One of these is the all-risk coverage on growing crops written by the Federal Crop Insurance Corporation. At the present time this coverage is written on a very limited basis. Since the private companies believe that they cannot write the all-risk protection, the Government moves in and includes not only hail coverage, which private companies do write, but also fire insurance on tobacco in storage warehouses.

Two other coverages which the companies have been glad to turn over to the Government are marine and aviation war risk insurance. You have also heard considerable talk about the great risk to which private companies are now exposed from atomic explosion of a nonwar nature, which many underwriters would like to transfer to the Government.

Protection against loss by waves driven by wind, and earthquake insurance would

easily be within the range of present Government thinking—perhaps even forest fire insurance covering standing timber owned largely by the rural population. And there are several plans of flood insurance now before Congress.

If you look at the trend of Government activities of an insurance nature in recent years and then undertake to project it into the future you have to take all of these things into account, they all are potentially pieces in the Government's program of furnishing aid to the people without much reference to cost.

Up to this point I have dealt entirely with property insurance. Now let's take a look at what the Government is doing in the field of life and disability insurance.

Our Social Security System

Social security has come to be quite generally accepted in this country as a part of our fundamental social structure. In theory, at least, our schedule of benefits is supposed to be a mere "minimum level," a "subsistence level." The theory is that each individual will provide the major portion of his insurance protection through his own private savings and arrangements of life insurance, annuities, and health and accident insurance.

But let us look at what has happened in the short space of fifteen years since our Social Security Act went into effect in 1937.

Life Insurance for Dependents

Arthur Altmeyer, Social Security Administrator, told the Appropriations Committees of Congress about a year ago that the survivorship benefits alone under social security then amounted to $190 billion of life insurance in force and that by the end of 1952 it will amount to $250 billion. Mind you, this figure does not include the old age pension benefits under social security, but is only the amount of life insurance which is payable under the law to the widow and surviving children of an insured worker.

Mr. Altmeyer told the Congressmen that only three years ago, in 1949, there was only $85 billion of this insurance in force. But in 1950, you will recall, Congress amended the Social Security Act increasing the benefits. These survivorship benefits were increased on the average of 77 per cent. It is mainly as a result of this increase that the amount of insurance in force will have tripled in three years.

The value of individual protection averages about $10,000 apiece for the 24,000,000 insured workers who have children. But some amounts may range as high as $35,000 for a single worker.

Other Life Insurance

The Veterans' Administration has approximately $60 billion of life insurance in force.

Life insurance in force under the Railroad Retirement Act amounts to approximately $5 billion and benefits for members of the Civil Service amount to another $10 billion force.

Adding these benefits together gives a total of $325 billion of life insurance in force under the four government schemes.

In contrast with this, private life insurance in force is now substantially below the $300 billion mark, but may reach that figure by the end of this year, including approximately $10 billion of insurance in force in savings banks, assessment plans and fraternal societies.

The Government will have more life insurance in force than all the private life insurance plans put together, and practically all of it has come into being under the short regime of our New Deal socialistic philosophy. And Congress now has before it a proposal to increase social security benefits by an additional 12½ per cent.

Annuities and Pensions

Private life insurance companies have annuities and pensions on their books aggregating ultimate payments of roughly $2 billion a year.

The social security system has annuities in force aggregating some $36 billion a year or 18 times the amount of the private life insurance companies. Even allowing for pension plans not insured in private life insurance companies, it may be conservatively said that social security annuities are easily ten to fifteen times as much as all private annuities put together.

Recent figures show that at least thirty million persons now draw pay checks directly or indirectly from the United States Treasury.

Socialization of Workmen's Compensation Insurance

A definite part of the socialization program of the planners is for the federal

government to take over all workmen's compensation insurance and integrate it with medical, hospital and income benefits for non-occupational accidents and sickness. Representatives of our government, both of the Federal Security Administration and the Department of Labor, are missing no opportunities to advance such a plan. The Congress of Industrial Organizations (CIO), in a recent convention, voted unanimously in favor of the ultimate enactment of a national workmen's compensation law.

Officials of our government, acting through the Inter-American Conference on Social Security, an offshoot of the International Labor Organization, have been promoting the socialization of workmen's compensation insurance, socialized medicine and other government benefits throughout Latin America. They have been successful in taking workmen's compensation insurance away from the private companies in Mexico and in Brazil in recent years. If time permitted I would like to tell you more of the details of these activities of our United States socialists.

The International Labor Organization's Socialization Program

But the activity in the Western Hemisphere is only a sideshow compared with what is being done to socialize insurance throughout the world through the machinery of the International Labor Organization in Geneva.

First, let me tell you a little bit about the objectives of the ILO and specifically its convention to provide "minimum standards of social security" which would be provided to employed persons through compulsory governmental action in every country which is a member of the ILO.

These "minimum standards" include:

1. Medical benefits.
2. Sickness allowances.
3. Unemployment allowances.
4. Old age pensions or allowances.
5. Medical benefits, sickness allowances, invalidity pensions or allowances, and survivors' pensions or allowances in case of employment injury (workmen's compensation).
6. Family allowances.
7. Medical benefits in case of maternity, and maternity allowances.
8. Invalidity pensions or allowances.
9. Survivors' pensions or allowances.

You will readily see that this list includes not only old age and survivorship benefits and unemployment compensation which are now a part of our social security system, but also includes the complete gamut of socialized medicine, sickness and accident benefits, including the coverage now granted under workmen's compensation—in other words, the full cradle-to-the-grave program complete.

This convention was passed on first reading just a year ago and is at this moment being debated on final reading at the ILO meeting in Geneva. This United States employer delegation is accompanied by a staff of advisors which includes William B. Barton, manager of the Chamber's Labor Relations Department, Leonard J. Calhoun, Washington lawyer, member of the Chamber's committee on social legislation and former chief of the social security technical staff of the House Ways and Means Committee, and Robert L. Hogg, executive vice president and general counsel of the American Life Convention.

"But," you say immediately, "our Senate would never ratify a treaty of that kind." You may be right. I certainly hope you are. The Senate's action will depend to a large extent upon the alertness of our people and that, in turn, depends largely upon the alertness of yourself and other businessmen like you. But, I would point out that three of the four members of the United States delegation voted in favor of this convention last year. That included Senator Murray, Philip M. Kaiser, Assistant Secretary of Labor, and George Philip Delaney of the A. F. of L.

The Cradle-to-the-Grave Philosophy

I interviewed Sir William Beveridge when he came to this country in the early 1940's, shortly after the publication of his famous report embodying Britain's "cradle to the grave" social security program.

It was the most discouraging interview I ever had during my days as a newspaper reporter and columnist. Sir William's whole philosophy was based on the assumption that it is not possible any more for a young man to work, earn, save and buy insurance so as to provide for himself and his dependents during his working years and his old age. If that assumption is correct, then our ideals of individual freedom and individual responsibility are wrong.

His conclusion was that the government

must subsidize him out of general tax funds by giving him free medical care, hospital and other benefits, an income to him if he is sick or injured, incomes to his dependents in the event of his premature death and a retirement pension for the worker himself—the program now espoused by the socialists through the ILO for the whole world.

Insurance is not only a great private business. It is also a mechanism for spreading individual losses over the many. That mechanism, when honestly applied to all persons in a class, becomes a highly scientific operation requiring the skill and training of experts.

But in the hands of government, where discrimination in favor of those with the greatest need is a social virtue, an abused and subsidized version of the mechanism may be quite simply and easily applied without much need for adherence to scientific or actuarial principles. It is this fact that constitutes the threat to our private insurance business.

It is important that you have this background on the attitude of our New Deal Administration. It has given much evidence that it is going down the line for the socialization of insurance and I do not know of any point at which it can reasonably be expected to stop.

PRESIDENT SPRAY: Thank you, Mr. Kirkpatrick. I'm sure that we all enjoyed your very fine talk.

Speaking of a little inflation being a good thing, I can recall when the Mexican dollar was only worth 50 cents in American money. Some of you folks have undoubtedly been down in Nogales, Arizona, where Mexico and the United States are divided by a street. You walk across the street and you're in Mexico and vice versa you're in the United States. Ponchovia, when he took over Nogales in the Mexican Revolution, didn't like the fact that the Mexican dollar was only worth fifty cents. He said, "Why should a Mexican dollar be only worth fifty cents of American money when the Mexican dollar has got twice as much silver in it as the American dollar?" So he decreed that the American dollar would only be worth fifty cents in Mexico thereafter. It happened that a couple of cowboys came down from the hills and got into Nogales on the American side and they only had a dollar between them. So they went in a bar and each ordered a drink. The bartender gave them fifty cents of American money. They drank their drink and they said to the bartender: "Would you mind giving us a Mexican dollar for the American fifty-cent piece on account of the fact that a Mexican dollar is only worth fifty cents," he reached in the till and gave them the Mexican dollar. They stuck it in their pocket and walked across the street, went into the Mexican bar and ordered a drink. They threw down the Mexican dollar. The bartender gave them fifty cents change in Nogales in Mexican money. They drank their drink and they said to the bartender, "Mr. Bartender, on account of the fact that the American dollar is only worth fifty cents over here, would you mind giving us an American dollar instead of that Mexican fifty-cent piece?"

He said, "Why certainly." They took the American dollar and went back across the line and had a couple more drinks and made several trips, went back to the ranch with the same dollar. So maybe a little inflation is good, but I don't think so.

I'm going to call upon Stanley Morris to introduce our next speaker. You all know Stanley. He's a member of our Executive Committee. The gentleman that he is about to introduce to you is a partner in his firm.

MR. STANLEY C. MORRIS (Charleston, West Virginia): President Joe, and Fellow Members of the Association: The next speaker was born in the State of Michigan. However, his parents within a few weeks corrected that error by bringing him to West Virginia to rear him. He was educated in our schools in the city of Clarksburg. He went to Princeton where he was graduated with high honors. He repeated that performance at the University of Virginia in the Law School just in time to enter World War II as a private. Emerging from World War II in October of 1945 as a Captain he entered the practice of law in Clarksburg, was shortly attracted to the American Legion and on the first occasion when in the local Post he was asked to speak about something in the language of one of the hill dwellers who was present, he said: "I seen we had ourselves a man." He was shortly elected Commander of that Post, later District Commander, and in 1948 Department Commander by the unanimous vote of the

Convention assembled and at Miami last fall he was elected without opposition, no one even nominated as an opponent, by the unanimous vote of the Convention the National Commander of the American Legion. He was then 34 years of age. In fact he was born a month after World War I broke out and some of us Legionnaires of the First World War begin to realize that time has slipped up on us and we had a new generation of leaders. Prior to that he had made quite an impression in Legion circles as the spokesman of that great veterans' organization before the Committees of Congress on foreign policy. He has come to be recognized as an expert in that field as Commander of the Legion since last October. He has traveled some 250 thousand miles in our country speaking before not merely Legion gatherings but great meetings of every kind. He has come to be recognized as one of the important young men of America, the Junior Chamber of Commerce last fall elected him one of the ten outstanding young Americans.

It is a pleasure to me to introduce to you Donald R. Wilson of Clarksburg, West Virginia, National Commander of the American Legion. (Applause).

United States of America

DONALD R. WILSON
Clarksburg, West Virginia

YOU do me great honor by according to me the privilege of this platform at this, your Annual Convention, and by according that honor to me, you impose upon me a rather peculiar sense of responsibility.

I recognize that gathered here for this Convention are many eminent members of the legal profession. You are all men of considerable standing and substance in the profession which you have chosen. I have pondered for many hours what I might be able to say to you that would justify the moments of your time that I shall consume. Certainly I can profess no particular professional knowledge of the matters that come under your jurisdiction here at this Convention, nor as a general proposition can I lay claim to any great knowledge of events that are transpiring during the critical times that we face. But it occurred to me that you are all here as representatives in one sense or another of clients of yours. I would like to address, therefore, a few words to you concerning the greatest client which you and I have ever had or ever will have; that client being the United States of America. (Applause).

You know, our country has fallen on evil days, and for those of us who are members of the legal profession the critical character of thees days imposes upon us a responsibility which only we can meet. We belong to a profession that has seen this country through many difficult days; we belong to a profession that has made outstanding contributions over the years, both in serving and preserving this nation.

As I have traveled around these United States, however, during the past months, I find more confusion, more doubt, more uncertainty, more induced fear than I have ever before been conscious of. I find the United States of America drifting—drifting I am sure, to its ultimate doom unless we acquire a leadership which is characterized by courage and vision instead of the leadership which is characterized by fear and doubt.

You and I are accustomed to analyzing arguments and positions and yet we have failed to analyze the arguments that have been advanced by our own Government during the past seven years. We may have done so privately, but I dare say that there are few if any of us who have done so vigorously and publicly. We have tended to buy what we believe to be a safe approach and an approach which unfortunately is now demanding blood sacrifices of many of our young men in a remote little peninsula called Korea.

I would suggest to you that now is the time for you first of all to ask yourselves some penetrating questions, give to yourselves some true answers, then ask the American public those same questions and demand of the professed leaders of the Amreican public those same true answers.

I would remind you that we have for

the past seven years devoted ourselves to what has been called a policy of Containment. In connection with the policy of Containment, let me ask you first of all if you believe, if you honestly and sincerely believe that your very life, your very existence is threatened by the almost overwhelming power of Soviet Imperialistic Communism. Do you believe it? If you don't believe it, then you should stand up and say that you don't, but if you do believe it, then you must necessarily question the validity of the policy of Containment.

I assert to you as a starting point in this discussion that Containment as a policy is by its very nature defensive in character and that it is defeatist in essence.

What is this policy of Containment? I assert to you first of all that it is a fraud in its inception. Containment was the word that was given to the support which the United States of America first gave to two comparatively small basically Middle Eastern nations of Greece and Turkey. It was a word which was applied after the fact of economic assistance and military advice. Economic assistance and military advice given actually to take the place of the economic assistance and military advice which Great Britain was no longer able to give. It was called Containment. The word caught. It took hold of the American imagination. We actually for a while believed that in those small nations of Greece and Turkey we were containing the vast power that is Russian Communism.

Because we bought a word, it was easy then for our leaders to sell us upon an extension of the meaning of that word. They advised us that the economy of Europe was tottering and that as a part of the policy of Containment it was necessary for us to use up the substance of America in order to provide for the economic security of Europe. But I assert to you that the application of the word Containment to that problem was a fraud. I am referring, of course, to the Marshall Plan, whereby we made available to the nations of Europe the vast substance and the material resources that are possessed by the United States of America. I say that it was a fraud because when the plan was originally announced, it was intended to be of assistance to the Soviet Union and its satellite nations as well as the nations of Western Europe. It was only after Russia and, because of her pressure, her satellites repudiated the necessity for being aided by the United States of America that we then spoke of it as a policy of Containment. We purchased the economic well-being of Europe. All over Europe today the production figures will show to you and to me if we will but look at them that the nations of Europe are more prosperous, that they are producing more, and that their economies are sounder than they were during the pre-War years. Yet at this critical juncture of our own history, we find ourselves in the position of being beggars at the International Council tables of the United Nations. In spite of all of the assistance that we have rendered, in spite of all of the help that we have given, now in our own hour of peril we find that demands are being made upon us to supply to Europe even more than we had previously supplied.

All of this, of course, transpired during a period of time when we were utterly neglecting, overlooking and losing the continent of Asia. So I ask you now: What have we contained? We certainly have not contained Communism, because since the policy of Containment was announced, Communism has made greater strides than ever before. Russia is in a stronger, more secure position today than she was certainly at the close of World War II. No, I would say what has been contained has been the United States of America. And because we have been so contained, because we have been so duped, and in one sense of the word—betrayed, we find ourselves at the brink of disaster.

These are rather peculiar expressions for a speaker on an American platform to be using and certainly they are not phrases that should fall lightly from my lips or from the lips of anyone else. Let us look at the picture a little more closely. After World War II, we of the United States of America earnestly desired a period of peace. We believed that all peoples all over the world shared that desire. We were instrumental and indeed we were the prime movers in the formation of an organization called the United Nations. Now, Gentlemen, you are lawyers. You know something about legal forms. You k n o w something about organizational background. You know that the United Nations is basically Anglo-Saxon in its legal make-up, but because of your knowledge, because of your wisdom, and because of your experience, you know that the

Anglo-Saxon's legal approach has not been adopted by half of the power represented in the United Nations. Yet day after day you and I sanction our further participation in, our continued support of the United Nations. It's sort of like saying that you can have a workable organization of business men and bankers on the one hand and thieves and safe crackers on the other hand. I ask you to use the power of your intellects and to recognize the basically unsound position that we find ourselves in when we deal through the United Nations.

Legally it's an impossibility, because the Soviet Union will only use our good faith and our earnest efforts to further her own objectives.

We are being enveloped in viciousnesses of all kinds. We find, for example, our very Constitution is being threatened because of the actions of the organization. All of you are familiar, of course, with the great studies that have been made by the American Bar Association. We of the American Legion have been proud to join with them in those studies, whereby there is demonstrated to be substantial reason to believe that certain of the covenants that are now being advocated by members of the United Nations may result in a completely new system of so-called Constitutional Law for the United States of America.

But what is more tragic than any legal formalism that we might speak of is the fact that under the guise of United Nations' action, we of the United States of America are bearing a tremendous burden in an actual armed conflict, and we are being deceived into thinking that it is a war which can be fought by half-way measures.

I picked up the paper last evening and I noticed an article in the paper, an optimistic article, which showed that we were inflicting great casualties upon the enemy forces. We had killed over a thousand Reds in the past week in bitter hand-to-hand combat.

It's easy for us to sit here in Lake Placid, to participate in a Convention such as this, to enjoy the fellowship and sociability that comes with association of those who have similar interests, and to enjoy the magnificent accommodations that we have here. It must be a great consolation to us to think that 8,000 miles from here there are a group of men, our own compatriots, who in our name, are inflicting in bitter hand-to-hand combat grave casualties upon the Red forces.

There are many of you I recognize who are members of the American Legion, many of you possibly who are veterans who are not members of the American Legion, but you know something about inflicting casualties in bitter hand-to-hand combat. We, too, are suffering casualties. And that is the astounding part of the message that I bring to you. For the first time in the history of the United States of America we as a people have been able to absorb almost casually a hundred and eight thousand American casualties, over six thousand brutal massacres without becoming aroused.

I ask you, Gentlemen, what has happened to the fiber and the substance of America? I ask you why it is that we can absorb those figures, that we can pretend to be engaged in a "police action" that is exacting such a great toll in men and money and in materials? I ask you what is wrong with America that we can day after day pick up our newspapers and read of conferences going on with the idea in mind of arriving at a cease fire in Korea by pre-judging certain issues? What has happened to us that we can calmly contemplate what amounts to an American sell-out at the conference table? That, too, is harsh language and I use it consciously and deliberately. Why do I say it's a sell-out? Gentlemen, there are certain issues that are supposed to be involved at that conference table, all but one of the important ones having been resolved. What have those issues been? First of all, there was the issue as to whether or not they were going to permit the North Koreans and the Red Chinese to build commercial air strips in North Korea. We negotiated about the question. Gentlemen, you're all realists, I trust. Do you honestly believe that that was the issue? Do you honestly believe that the North Koreans and the Red Chinese are going to build commercial landing strips in North Korea? There isn't a person in this audience who is stupid enough or naive enough to believe that, and yet we calmly permitted our negotiators to negotiate on the question and to yield to the enemy when deep in our hearts and in our minds we knew that those strips to be built were military air strips. It gives to our opponents an opportunity to acquire closer air bases from

which they could launch their 1,700 jets against our 200 jets over the territory of Korea. But we negotiated about it.

And then we negotiated about whether the Soviet Union could be considered a neutral nation to enforce a truce if it was arrived at. That's one of the reasons I asked you at the beginning of these remarks, do you really believe that this is an all-out conflict? Do you believe that the Soviet Union is neutral? Do you believe that it is a matter that you can in good faith and honestly negotiate about? Of course you don't. You know that Russia, first of all, instigated the attack. You know that she has sustained the enemy. You know that she is not neutral. You know that she is a partisan and that her satellites are partisans, and yet your negotiators in your name negotiated about it.

I ask you what has happened to the fiber and substance of America, and I am somewhat discouraged because every place I go, I hear people say, "Yes, it's a serious problem. It's a grave threat that we face, but let's see whether we can work something out." I assert to you that the time has long since passed when we can work something out.

We have facing us on the part of Russia alone, almost 200 divisions. We have over 25,000 first line Russian planes, many of which are jets, a known half a thousand submarines and possibly a thousand, and we pretend we are going to contain that power by building an inferior defense force on the continent of Europe, by neglecting our own defenses, and by sacrificng our moral stature in the world in the one area where actual conflict has broken out.

I would like to be able to tell you that the future looks good for you and for me. I would like to tell you that we can successfully contain. I would like to tell you that we can, by planned inferiority, successfully defend. Unfortunately I am one of those who believes that the threat is real. I am one of those who believes that the tremendous power that is the Soviet Union is being marshalled because it is going to be launched against us unless we can build a superior force promptly. This is no time for slow-downs. This is no time for strikes in vital defense areas. This is no time for complacency. This is a time for you and for me to take a good long look at ourselves, to recognize that we constitute America, that we are the ones who will determine whether America is going to live or die; that if America is to live, it will live because of its prompt acquisition of strength and power—overwhelming strength and power in the hands of those of us who are willing to use that power for the accomplishment of good and freedom. There has never been a time when the challenge for America has been greater. There has never been a time when you and I as lawyers have a greater obligation than we do now. There has never been a time in the history of America when we have been less active in discharging that obligation.

Now I ask you to use the intellects that are yours to cut through the duplicity that is being practiced in America today, to cut through the subterfuges that are being represented as valid arguments today, to strengthen the moral and the physical and the material and the economic fiber of America and to dedicate that new found strength to the battle which has already been joined and is raging.

If you will do that, then this darkness is merely that darkness that precedes the era of great light. If you fail to do that, you will continue to sacrifice your compatriots, you will continue to depreciate America, you will encourage the philosophy which exalts security over freedom, and you will enslave yourselves and your fellow men.

As you leave this meeting I ask you to think. I ask you to rededicate yourselves to the principles upon which you build your profession and to take from the challenge the inspiration that our profession has always taken from challenge and to lead us into the era of great light, prosperity, freedom, and peace. (Applause).

PRESIDENT SPRAY: Thank you, Commander Wilson for your very fine and serious speech. I am sure that the members of this Association have not only enjoyed it but they will do as you ask and think. Again thank you.

The next matter on the program is the report of the Secretary.

I don't have to tell the previous presidents and officers of this corporation about the Secretary's job. It is one of the most important in the organization and I think that it calls for more time and work than any other office. I'm going to call upon our Secretary John Kluwin now for his report, but before I do so, I want to tell you about the good work John and his

organization has done. Without his help, I am sure we would have never been able to arrange for this Convention and carried on the other work throughout the year. John has done a splendid job and I for one am most grateful. John. (Applause).

SECRETARY JOHN KLUWIN (Milwaukee, Wis.): Thank you, Joe, and I can only add that it has been a great pleasure to work with you and the harmony that we have had throughout the year, I think, offers well for the success of the Association. To be forewarned is to be forearmed. I can't imagine anything more unenviable than to have to follow with a mundane report the classic oration that has just preceded me.

Report of Secretary

JOHN A. KLUWIN
Milwaukee, Wis.

IT is my pleasure to report to you that the affairs of the Association from the Secretary's standpoint have progressed very smoothly since we last met at The Greenbrier a year ago. Our present membership is 1,453 as compared to 1,441 last year. During the past year we have admitted 63 new members but have lost 26 through resignations, 19 by death, and 13 members have been dropped for nonpayment of dues; also seven members have been reinstated. At the present time there are 21 applications in various stages of processing.

In preparation for this convention, I made a trip to this delightful club on May 28 and spent the entire day of May 29 with the staff of the Lake Placid Club working out the details of this convention for your pleasure.

I want to take this opportunity to thank all of the staff members for their most courteous consideration. I can assure you that if there is anything they can do to make our visit here more pleasant, they will not leave any stone unturned to accomplish such a result.

Our President and the members of the Executive Committee have been most helpful to me in carrying on the Association's work which, incidentally, increases with each passing year.

PRESIDENT SPRAY: Thank you, John. (Applause).

Do you care to give your report now, Mr. Treasurer?

Report of Treasurer

FORREST S. SMITH
Jersey City, N. J.

BECAUSE we operate on a fiscal year from November 1 to October 31, this report of necessity is a short period report for the period November 1, 1951, to June 1, 1952.

At the beginning of the period our assets were $15,957.43, consisting of:

Cash	$ 957.43
U. S. Savings Bonds—Series G	15,000.00

During the period the Receipts were $28,731.45.

Our disbursements were $14,128.48, leaving a balance at the end of that period to June 1 of $30,560.40, consisting of:

Cash	$15,560.40
U. S. Savings Bonds—Series G	15,000.00

Let me again state what I have each of the last two years that at this point in our Fiscal Year we have taken in practically all the money that we will take during the entire period, but we have only spent about half the amount that we will spend.

A full report for the year ended October 31, 1952, will appear in the January, 1953 issue of the Journal.

Except for that report, this will be my last report to you. When I was elected Treasurer in 1947, there was no rule or custom on the number of years one man would hold the office. The Executive Committee and I discussed this matter and we agreed that one man should not be Treasurer for more than five years. This is my fifth year and at this Convention a new Treasurer will be elected.

I would like to say to you that it has been a distinct privilege to be Treasurer of this Association and it's something that I will always remember and I'll always be grateful for. Thank you. (Applause).

PRESIDENT SPRAY: Thank you, Forrest. You've done a wonderful job as Treasurer of this Association. However, I am a little disappointed in the amount of money that the Association has on hand. I feel somewhat like the old miner felt when he got his *Asset* returns from some ore that he had sent to be valued. He was asked what he thought about it. He said, "Well, it's not as good as I expected but it's better than I thought it would be."

Is George Yancey here?

I would like to have your report, George.

Report of Editor

GEORGE W. YANCEY
Birmingham, Alabama

MR. GEORGE W. YANCEY (Birmingham, Ala.) Editor of the Journal: Mr. President, Ladies and Gentlemen: As I was walking up here I was requested to make this report short. I'll do so. I want to thank each of you who have contributed to the Journal by writing an article this past year. I want to thank those who promised and have not as yet sent the article in because I know you'll soon do so.

Yesterday afternoon Lester Dodd as Chairman of the Journal Committee called a meeting. At that meeting, it was agreed that this next year we would try to follow a different plan in obtaining articles for the Journal: namely, we would request the members and those particularly who read the Journal to write us and suggest subjects for articles. We will then screen the requested subjects and assign or persuade members to write articles on the selected subjects and thereby prevent a duplication of articles.

Now, the Journal is only as good as the members make it and we ask your continued cooperation and again thank you. (Applause).

PRESIDENT SPRAY: Thank you, George. I know I don't have to tell you members about the Journal. It's the most outstanding magazine of its kind in the United States.

Is Stanley Morris here?

The Executive Committee at its MidwinterMeeting, January 15-18, 1952, unanimously adopted the Resolution recommending amendment to Section III, Article 5, of the By-Laws of this Association. Notice was duly given pursuant to Article 16 of the By-Laws, that such proposed Amendment would be presented for action at this meeting.

There being a quorum present, Stanley hasn't arrived yet, I will ask our Secretary, John Kluwin, to present this matter.

SECRETARY KLUWIN: Section III as it now appears in the By-Laws reads as follows:

Amendment to By-Laws

"Any member who shall be in default on May 1 of any year in the payment of dues shall be promptly notified thereof by registered mail, sent to such member at his address as shown on the Treasurer's record. Unless such member shall pay such dues within thirty days after such notification, he shall be automatically dropped from membership in the Association."

Now, in order that you may understand the proposed change, the following language has been recommended:

"Subject to reinstatement upon request, therefore, to the Treasurer made prior to October 31 of said year accompanied by reinstatement fee of $5 and such delinquent dues."

It's been the practice heretofore that we have been unable to do anything about

one who has been dropped for nonpayment of dues except to reprocess him as a new applicant. However, if the proposed amendment is adopted, by a simple procedure as outlined we can handle that condition and it is the recommendation of your Executive Committee as appears on page 136 of the April issue of the Journal that this amendment be adopted and Mr. President, on behalf of the Association I move the adoption of this proposed amendment.

. . . The motion was seconded. . . .

PRESIDENT SPRAY: You have heard the motion. All in favor say "aye;" opposed. The motion is carried.

The Report of the Thirteen Standing Committees have all been filed. These gentlemen have done an excellent job.

I would like, however, at this time to have you meet the Chairmen of these Thirteen Standing Committees. As I call your names, I would appreciate it if you would stand up or come up here so we can all see you.

C. Clyde Atkins, Aviation.

G. Cameron Buchanan, Auto Insurance.

James B. Donovan, Casualty.

Newton Gresham, Fire and Inland Marine.

J. H. Gongwer, Financial Responsibility.

Harold W. Rudolph, Fidelity and Surety Law.

Leslie P. Hemry, Health and Accident.

Henry W. Nichols, Home Office Counsel.

Byron E. Ford, Life Insurance.

Raymond Scallen, Malpractice.

George E. Beechwood, Marine Insurance.

Laurent Varnum, Practice and Procedure.

James A. Anderson, Workmen's Compensation.

Howard Smith, Public Relations.

Apparently they've all gone. (Applause).

Now, in accordance, Gentlemen, with Article 8 of the By-Laws I now appoint a Nominating Committee of five members of this Association, to make their report to the Association as to nominations for the office of President-elect, two Vice-Presidents, Secretary, Treasurer and Members of the Executive Committee.

There are to be elected this year three members of the Executive Committee. The By-Laws provide that no two members of the Executive Committee other than the officers shall be from the same state. As the states of Michigan, West Virginia, Illinois, Iowa, Connecticut, and Ohio are now represented on the Executive Committee by members whose terms are not expiring, it follows that members of this Association from some states are ineligible for consideration this year for membership on the Executive Committee. They are, however, eligible to serve as officers.

I have selected and do hereby appoint the following Nominating Committee:

L. Duncan Lloyd, Chairman

Bob Earnest

Henry W. Nichols

Fred Moeller

E. D. Bronson

Dunc, do you have any announcements to make to the members of your committee if there are any of them here.

MR. L. DUNCAN LLOYD (Chicago, Ill.): Yes, I have.

PRESIDENT SPRAY: Come forward, will you?

MR. LLOYD: Without consulting with the members of this committee, I'm going to make some suggestions. The first thing, I am sure this Nominating Committee will want are suggestions to fill the various offices. However, in the past, the job of being on the Nominating Committee has been a very arduous one, and I would like to go on record as saying that there are adequate number of members of our Association that are qualified to be selected to fill the various offices and it is a question of the Association selecting a man that can do the best job for the Association. Now, we welcome suggestions, but pressure groups are very harmful and a number of people who would recommend a member for office, of course, is persuasive but it's not controlling.

Now, as the President just announced, certain states are ineligible for consideration and I believe you will recall Mr. Forrest Smith who has made an excellent Treasurer over the five-year tenure of office is not a candidate for re-election and I might say that Henry Nichols says he's solvent so we're happy about that.

If I have my suggestions adopted, I would like to meet with the four other members of the Nominating Committee for lunch immediately after this meeting and then if the Chairman of the Open Forum Committee will permit me to make

one announcement, I'll state when and where the meetings of the Nominating Committee are going to be held.

PRESIDENT SPRAY: Bill Baylor, who has been a member of this organization since 1929, was unable to come on account of some Federal Judge not being sympathetic. In his absence, I have asked the Past President of this organization, Oscar Brown, to take his place as Chairman of the Memorial Committee. Oscar, would you come and give us your report?

Report of Memorial Committee

MR. OSCAR J. BROWN (Syracuse, N. Y.): Mr. President, and Ladies and Gentlemen:

It is entirely fitting that each year we pause a little in our deliberations and pleasurable pursuits to express and record in our permanent records our tribute of respect and sorrow for those of our members who have died during the past year.

We cannot, even if we wished, place their physical remains in catacombs for our continued view as did the inhabitants of Palermo in not too distant times. We can make and leave this brief expression of our loss—coupled with an acknowledgment of our gratitude for the period of association with those who have gone.

We have this year 20 upon our roll: Lawyers all, each clothed with particular qualities known more to some of us than to others. Time will not permit a reference to each, but in paying specific tribute to the one known well to more of us and for a longer period of time may we suggest that in some of the many facets of his life he was typical of all.

Arthur G. Powell, known to us all, as Judge Powell, was one of our oldest active members. Born in Blakely, Georgia, in 1873 he was long recognized as one of the ablest lawyers in the nation. He was a Judge of the Court of Appeals of Georgia for the first seven years of its existence until he resigned to return to active practice. His extra-curricular activities included his constant and active service in this Association, in the American Bar Association and in his State and local Bar Associations.

He was a former member of our Executive Committee, the author and father of our Constitution and By-Laws and as early as 1930 a speaker at our annual meeting. He was chairman of the American Bar Association Committee which drafted and procured the passage of the Federal Interpleader Act. His legal authorship included several textbooks which are widely used in his own State and many of us have had the great pleasure of reading his interesting reminiscences in "I Can Go Home Again."

But the fullness of his life was really brought out by the delightful sociability of the contacts so long enjoyed with him at our meetings with him and his wife, "Miss Annie."

This expression of our love and honor for this stalwart fellow member is as well our tribute to the others on our list whose names will now be read as we stand to honor their memory:

Walter T. Bie, Green Bay, Wis.
Arthur G. Powell, Atlanta, Ga.
Dean Owens, Rome, Ga.
R. F. Baird, Ft. Wayne, Ind.
Claude V. Birkhead, San Antonio, Tex.
Carl S. Salmon, Amsterdam, N. Y.
E. M. Clennon, Boston, Mass.
Robert L. McReynolds, Clarksville, Tenn.
J. Morgan Stevens, Jackson, Miss.
Clifford M. Toohy, Detroit, Mich.
Alvin C. Tripps, Kansas City, Mo.
Edgar A. Neely, Sr., Atlanta, Ga.
W. T. Doar, New Richmond, Wis.
Stanley M. Rosewater, Omaha, Neb.
George Z. Barnes, Peoria, Ill.
John B. Odum, Valdosta, Ga.
James M. Peebles, Nashville, Tenn.
Philip C. Sterry, Los Angeles, Calif.
David J. Kadyk, Chicago, Ill.

PRESIDENT SPRAY: Thank you, Oscar.

Gentlemen, I want to remind you of the Open Forum Program this afternoon. Don't miss it.

If there is no other business to come before the meeting, we'll adjourn until one forty-five.

. . . The meeting was adjourned at twelve-fifteen o'clock. . . .

WEDNESDAY AFTERNOON SESSION
June 18, 1952

PRESIDENT SPRAY: We have an announcement to be made by the Chairman of our Nominating Committee.

MR. L. DUNCAN LLOYD: Between nine and ten p.m. tonight in the Secretary's office on the first floor, you pass it as you come to the registration desk and go to the Post Office. Now, you can't miss it. The room that they had assigned for us was up in the mountains so we got a room on the first floor. We're going to have a one-hour meeting tonight for anyone that wishes to come and make suggestions to the Nominating Committee. Tomorrow night from eight to ten p.m., if you're not in the room by ten p.m., you're not going to get there because the Committee will have to go into Executive Session after ten p.m. So, therefore, we have allotted three hours for you gentlemen to come before the Nominating Committee and make your suggestions. I hope to see as many of you there as desire to come. Thank you very much.

PRESIDENT SPRAY: Gentlemen, don't be perturbed at what Dunc had to say. I'm sure that any of you gentlemen regardless of what time you get in there, you will be heard, and I want you to go in there and tell the Committee what officers you want and if you have any trouble, see me. I have a lot of confidence in Dunc, and I know that he will want to hear you, but he does want to get away from this holding of meetings until the wee hours in the morning because, after all, it's not a very good situation for the wives of those members who serve on that Committee. They have a tough job and they respect their wives and I think it is for that reason that Mr. Lloyd has fixed those hours.

Gentlemen, before you go I want to tell you that the Nominating Committee is holding a session again tonight between eight and ten o'clock. I want all of you who have any ideas at all to go there and give them to the Nominating Committee. You will be heard and you will be expected, so please don't forget that. Pat.

MR. L. J. CAREY (Detroit, Mich.): Mr. President, I just wanted to announce that the Humble Humbugs cocktail party will be held in the Norge Room at 6:30 tonight. The Norge Room is the same room in which the President's reception was held last evening, and to the Humbugs, the members of the Humble Humbugs, the initiation tonight will be held in the Norge Room also and starting at ten p.m. I want all of the Humbugs to be present. Thank you very much, Mr. Spray.

PRESIDENT SPRAY: Thank you.

President-Elect Christovich, you have an announcement?

MR. CHRISTOVICH: I just want to announce that all of the chairmen and vice chairmen and the members of the standing and working committees have been appointed and their appointment has been made known to them. I would suggest that some time during the day the chairmen or in their absence the vice chairmen would get together with their committee so they can meet tomorrow. It is usual to meet right after the end of the Convention at two o'clock to formulate their plans for the coming year.

Mr. Chairman, while I am on my feet, I would also like to say that it has been suggested that I disclose what is probably an open secret anyhow and that is that next year we will meet in Quebec at the Chateau Frontenac and I think the meeting is going to take place the last three days of June or the last two days and the first day of July and that will explain some of the statutes that you will probably find on the bulletin board outside and which have been arranged by Mr. Kluwin, the tear sheets out of the June issue of Holiday which has a splendid description of Quebec and the Chateau Frontenac in particular.

PRESIDENT SPRAY: Thank you.

FRIDAY MORNING SESSION
June 20, 1952

The Friday Morning Session convened at nine forty-five a.m. Mr. Joseph A. Spray, President of the Association, presiding.

MR. SPRAY: I am going to ask Milton Baier, member of our Executive Committee, to introduce the first speaker to you this morning.

MR. MILTON L. BAIER (Buffalo, N. Y.): Mr. President, Ladies and Gentlemen: I have the proud privilege to present and commend to you my fellow member of the Erie County New York State Bar who has graciously accepted our invitation to address us this morning. After twenty years in the general practice of the law, he became a Justice of the Supreme Court of the State of New York, and thereafter a

Judge of the Court of Appeals, our court of last resort. He is the author of the book *SHARP QUILLETS OF THE LAW* commemorating the one hundred years of the existence of the New York Court of Appeals and sanctioned the influence of its decisions in the development of our present day concept of morality in the field of commerce and port liability.

Our guest speaker has lectured at the University of Buffalo, Yale University, the University of Virginia, the University of Wyoming and Notre Dame University. He has contributed articles to The Fordham Law Review, Notre Dame Lawyer, Buffalo Law Review, Syracuse Law Review, Rocky Mountain Law Review, New York State Bar Association Bulletin, and New York Law Journal.

His degrees include Bachelor of Arts, Bachelor of Laws, Master of Laws, and Doctor of Laws.

Ladies and Gentlemen, I present to you the Honorable Charles S. Desmond, distinguished lawyer, author, educator, and judge, Associate Judge of the Court of Appeals of the State of New York, who will speak to us on the subject, "Practical Problems of the Courts." Judge Desmond.

(Applause).

Practical Problems of the Courts

HON. CHARLES S. DESMOND
Buffalo, N. Y.

SOME years ago I was a member of the New York State Board of Public Welfare and a woman social worker addressed the Board on a subject of some seeming importance. She prefaced her remarks by saying, "I'm a little crazy on this subject." When you think too long and too hard on any subject, especially a subject which bears the earmarks of reform, you do tend to become a little obsessed with it about to the point of irrationality.

I do think, though, that the problems I'm going to talk about are practical ones, and I hope the solutions which I suggest, tentatively and modestly, are not too wide of the mark.

I had the opportunity a while ago, if you could call it an opportunity, of reading a translation which was turgid even in the English, of a book which must have been exceedingly turgid in the native tongue of the writer. The author was Mr. Vishinsky, of whom you have heard as a Russian diplomat, but who is also one of the leaders of the Russian Bar and was formerly a famous Russian judge. I'm not going to attempt to describe to you his book, but throughout it he is comparing his system of courts and law with ours to the disadvantage of ours, of course. He keeps referring to "people's courts." That's a favorite phrase of the Russians, you know. Anything in Soviet Russia is given the adjective "people's." But thumbing my way through the book, I found that the Russians at least as to their courts and legal system, give a peculiar definition of that term "people's." And what they mean is this: They don't pretend that their courts enforce and apply a common system of law. They don't pretend that there is prevalent in Russia a system of law which bears down equally on all litigants.

What they mean by the "people's courts" is roughly this: That the judge in a Russian court, on a Russian trial is supposed to give a decision not according to fixed norms of law, but according to his concept of what is best at the time and place for the people, but by the people he clearly means the ruling regime, the Communist party.

That got me thinking. Ours are people's courts. This is merely preliminary to what I want to talk to you about. Ours are people's courts, owned by the people, with the judges chosen by the people, and particularly people's courts in the sense that they're open to all people and all have access to the same system of judging and the same applicable rules of law. All that being so, and it has been so in this country for well nigh 200 years, it seemed remarkable to me when I first became a judge that the people, and I mean educated people, people of culture, people of wide experience and reading, seem to know and understand so little about the courts as compared to other organs of the people's government in our country. And

it seemed to me, on reflection, that at least one of the reasons is that our system of courts is so complicated or seemingly so complicated.

I must ask your indulgence for talking principally about New York State, because it's the only state about which I know anything in particular. I make it a little game, on occasion in talking to Bar associations, to defy anybody in the room to tell me—and I won't try it this morning to the embarrassment of anybody here present—to tell me how many courts there are in New York State. That is, how many local, as distinguished from Federal courts, how many different courts there are or at least how many differently named courts there are? Well, there are 21, as it happens. We have in the State of New York, outside the Federal courts, local, county, city, village, municipal courts twenty-one in number, or at least twenty-one in name.

Of two of those courts, I'm sure, none of you recall having heard. One is the Court of the Judiciary, so-called, which fortunately has never been called upon to function. It's the court that is supposed to try judges for their misfeasances or malfeasances.

We have down in New York City, as some of you know, a court called General Sessions, which boasts of being the oldest court operating under its original name in America. I found out, in my research, that even that isn't true, because we still have in New York, still functioning, a court that goes back to the time before the white men came to these shores, because on our Indian Reservations, of which there are several in the State, we have a court called the Peacemakers Court.

Now, what I'm driving at is this: It does seem to me that one way in which we could make our people acquainted with their courts, not our courts, is to decrease the number of these courts, to unify them, to make them fewer in number.

You know that by function there are only two kinds of courts, trial court and appellate court. A great state like New York, of course, needs some specialized courts like domestic relations courts, perhaps small claims courts, but, aside from those, it does seem to me that it would be possible, not merely theoretically possible but factually and practically possible, to reduce down the number of courts of a state like New York so they would be fewer, and so that the system would make some sense to the people whose courts they are.

That such a thing is possible is evidenced by the fact, as I understand it, that in a state like Massachusetts there are only five courts, five differently named courts. In Florida there are fourteen, Georgia has eight, just to pick some samples. Out in the State of Wyoming, where I spent a few weeks a while ago, they have only three: Justice of the Peace Courts, Statewide District Courts of General Jurisdiction and a Supreme Court with full Appellate Jurisdiction. I don't suppose that the time will ever come in New York when we can get our courts down to three, but I do think we can do a lot better than we have done so far.

Besides the complexity that is caused by the great number of different kinds of courts, we have an even worse defect, I think, in the names of our courts, and the names of courts, of course, come down historically. Some of them come from very ancient times. The more recently organized have names that are more expressive of what they do.

But we have in New York courts with names like General Sessions, Special Sessions, Surrogate's Courts, Appellate Division—titles that do not mean much to the people whose courts they are. I hope that if the time ever does come when the Bar faces up seriously to a program of simplification of our courts, we try to make their names more expressive of their separate functions. We do a little better in this State than they used to in olden times because in times agone in New York, in Colonial Days, in the early days of statehood, we had courts with names like Marine Courts, Patroon Courts, Courts of Oyer and Terminer, Courts of Assize, Exchecquer Courts, and believe it or not, in the early Dutch days, there was a court called, and I'm sure I'm not going to pronounce these words right, a Court of Schout, Burgomaster and Schepens, whatever that might mean.

Getting down to a subject which I think is more immediately practicable and on which perhaps you yourself have done some thinking, I have observed that in the State of New York, while there is, as you of course read in the newspapers, a great increase in the number of cases in the trial courts, to an extent that at least in Metropolitan New York, there is a great time lag in the trial of cases, the number of

appeals that reach our appellate courts, particularly our court, has gradually decreased over the years, slowly but definitely.

That's an interesting phenomenon, I think. Interesting that as the number of trials increases, the number of appeals decreases. What is the reason? I took from your Journal, I think, of last year, some remarks of one of the speakers. In it he said among other things, "Litigation or courting has become increasingly expensive. I predict that the volume of litigation will be reduced by an important percentage because litigation has been priced out of the market." I hate to tell you that he was talking about a subject that I'm not talking about. That is, about lawyers' fees, because I don't have to argue in this august assemblage that lawyers must live and must be paid, but there is an element of cost of litigation which I think has exceeded all bounds and which I think is in the fullest sense money thrown away. That is the cost of printing records and briefs. Printing is still required, in New York State appellate courts, by statutes and rules of court. I noticed, on a little checkup, that in the latest volume of Reports of New York Court of Appeals, that is Volume No. 302, which included cases up to just about a year ago, for part of a court year, there are in that volume reports of 256 appeals to the highest court of New York. Of those 256, 109 involved litigations in each of which at least one governmental body was a party. That means that out of 256 appeals, only about 140 or about 52 per cent, are so-called private litigations. That to my mind is a fact that calls for the attention of the Bar. We maintain in this State, and other states maintain, most elaborate and expensive appellate apparatus, appellate courts of size and prominence and complexity of structure and organization and yet in the Court of Appeals as of that several-month period, despite the fact that 260 appeals were argued and disposed of, only 140 of them were so-called private litigations where the litigants on all sides were individuals or private corporations.

I have a lot of statistics here that I'm not going to bore you with as to how much this printing business costs. I suppose it is most unusual that any appeal comes to our court, where the cost of printing the record is less than several hundred dollars, and the cost of the printing of the briefs is added on to that. Of course, many of the records are much longer than that, and we have instances where the cost of printing the record alone runs into the thousands of dollars.

Now, as you know historically, these records came to be printed in a day when there was really no choice as to method of duplication. A record to be presented to an appellate court had to be hand written or printed, and in those days printing was quite cheap. I can recall in my own experience when printing was one of the cheapest things you could buy. It isn't cheap any more.

There is, of course, some utility in having these records printed. It isn't merely an ancient custom. Judges are usually elderly people with old and tiring eyes, and it's at least the theory that we need the printed page to save our eyesight. Well, be that as it may, you know that in modern times there are other ways of reproducing material. In one of the southern states, I think it's North Carolina, but I'm not certain, there is a procedure where the court itself, the appellate court itself, reproduces the records by machinery that is available in the court house. I can't recall the name of the process—multigraphing or something like that. It looks just as clear as printing. It's just as easily read. It's just as permanent and the cost is only a fraction of printing cost.

One of the official stenographers in the district up-state where Milton Baier and I live, told me of another system. I'm so poor at mechanical things that I can't describe it, but it involves a sort of master sheet and the stenographer who must transcribe the record in any event transcribes it right on to this master sheet and that can be reproduced in any number of copies at a very limited cost.

I think lawyers pay too little attention to these things. I think they pay too little attention, whether you look at it from a patriotic position or from a selfish position. As Americans interested in preserving the system of government in which we believe, and which certainly includes the courts, we should be alert to make that court system function to the benefit of as many people as possible. I am not urging a great increase in litigation. I am urging that the courts be available to the litigants and I do hate to see a situation where a man's opportunity to come to an appellate court is conditioned on his fi-

nancial ability to spend several hundred or several thousand dollars for printing a record. I do not suppose that many of you practice in the criminal courts, but there, I think, the situation is even worse, because the records are usually long in criminal cases and the cost of printing is increasingly high under the New York system. In first degree murder cases, that printing cost is paid out of the public treasury. But in criminal cases of other kinds there are many instances where the family of the defendant who is presumed to be innocent, and who in some cases is innocent I suppose but has been convicted, where the families have literally been impoverished by the cost, not so much of legal fees, as by the absurd, unnecessary, meaningless custom of printing every record and every brief in the appellate courts.

Now, it is not the courts. I suppose the courts are in part to blame, but judges don't like to take part in these controversial matters. Rightly or wrongly we leave it to the Bar, and of course, lawyers are busy people and so many of them are tied down in law practice to the everyday affairs of every day, that they do not stand off and look at these problems. I think we have a tendency, when we get together, to talk about matters largely theroetical. That's good for us, of course, but we don't always get down to the really practical problems of our own trade. Although like my social worker lady friend I may have become a little crazy on some of these subjects, I am sure that it would be in the public interest if lawyers and Bar associations and this great Association, for selfish reasons and for unselfish reasons, would devote itself to an inquiry as to how best to reduce this mechanical expense of our court system. I am sure that a great many litigants, good citizens, are shocked and astounded when they are first told that in order to get to an appellate court, a cause in which a man believes, his own cause, he has to spend a whole lot of money to have a record printed.

I will now tell you of another problem which is of immediate practical importance to lawyers but which gets the attention of very few of them, and that is the education of lawyers and particularly the Bar examination processes and systems.

We have in New York a very elaborate system of law schools. We have ten different law schools in this State, and we have a well-staffed, well-supported, old and I think efficient system of Bar examinations. Our ten law schools in this State are all approved and certified by the State Education Department in Albany and all of our ten law schools are accepted and approved by the American Bar Association and by the Association of American Law Schools.

So we have ten of those schools, a great majority of the graduates of which take the New York Bar Examinations and a large percentage of whom pass it eventually. We have ten law schools approved by all the appropriate bodies and we have a very carefully worked out system of bar examinations. Now, here is the anomaly of the thing. I think it is an anomaly. Out of the group of law graduates who will take the New York Bar Examinations this month, something like sixty per cent only will pass the whole Bar examination the first time.

Now, the second anomaly, to my mind at least, is that of those who fail and keep on taking it—and most of them do—ultimately practically all of them pass.

So we have a system where our law schools, some at least of which are parts of major universities in this State, law schools whose curricula and faculty are at least to a degree approved by the State and actually approved by the American Bar Association and the Association of American Law Schools, where their graduating classes pass the Bar the first time to the extent of sixty per cent only.

That to my mind is a contradiction of terms. It is a logical impossibility, it seems to me, that 40 per cent of the graduates of approved and certified law schools, law schools approved by the State of New York, are unable to pass the Bar examination given by the State's own Board of Law Examiners. I do not know the reason or reasons and I'm sure nobody else does. There are the most elaborate statistical surveys on this thing, the most elaborate processes for correlating class standing and Bar examination results. You would be astounded to see the mass of statistical material that is available but it has not yet brought anyone, so far as I know, to the answer of why the State-approved law schools turn out 40 per cent of graduates who cannot pass the State set Bar examination and the other and more difficult question of why those who can't pass it the first time, pass it at later occasions.

When law schools seek approval by the State and by the Associations, they get that approval as a result of exhaustive examination. The inspectors from these bodies go in. All these several bodies separately as I understand it, go to these law schools and they check them and examine them and test them and finally give them the stamp of approval.

I don't see the logic or the sense, and I'm probably wrong because almost everybody tells me I'm wrong, I do not see the sense of an approved and certified law school, with an approved curriculum and qualified teachers, not being able to certify a man into the profession. Now, I know that if this were an open forum, there would be a score of people ready to answer me and prove I was wrong. It has always been thought, and I suppose correctly that Bar examinations are needed as a check on the law schools. The only way that the level of performance can be maintained in the law schools is by testing them and here is where I part company with most critics on the subject. Most of them say that the only way in which the performance of the schools can be tested is by Bar examinations.

Is there another way? Isn't there a more sensible, a simpler, a more comprehensive way of testing the law schools and one that is not quite so rough on that 40 per cent who every year graduate from our law schools but cannot pass our Bar examination.

It seems to me that, with less effort and less expense and certainly with less cruelty than is implicit in the present system, the State of New York and the professional associations could maintain a continuous survey of the law schools, a continuous checking on their faculty and curricula to the end that there would be available at all times a mass of material which would make it possible for the State currently to accept the graduates of these schools for immediate entrance in the Bar without the additional test of the Bar examination.

It would be objected, of course, that such a continuous survey would be very expensive and very elaborate. I don't think it would be any more expensive or elaborate than the Bar examinations that we have today with all the personnel and all the cost of running them. And, after all, the present system of certifying law schools and maintaining the certification and keeping it current, really could be expanded only a little to produce the results for which I contend, that is, that there be a testing process, continuous and complete, which would insist on the law schools maintaining a level so high that the State could accept their graduates for admission to the Bar without further examination. And that's done in other fields. For a hospital for instance, to continue to be a member of the appropriate associations, it has to subject itself to a continuous, almost continuous, inquiry, and the personnel who do the testing see to it that the procedure, personnel and all the rest of it are kept up to standard, or the hospital loses its certification.

There is a terrific wastage of time and effort in this Bar examination business in our state and it is one of the things that to my mind indicates that we of the Bar, I don't say you of the Bar, I say we of the Bar, do not focus our attention regularly on problems that are of immediate importance to us.

Now, I know that in some of your minds may arise the idea that I am making some kind of plea for easier admission to the Bar. I don't think that the change which I tentatively advocate here would have any such result. As I told you a few minutes ago, almost everybody who continues to take the New York Bar Examination ultimately passes it, so the present system does not have any particular utility in keeping down the number of lawyers. And I am not sure there is any necessity for keeping down the number of lawyers.

When I was in college a good many years ago, I was told, as I suppose some of you were told, that the Bar is an overcrowded profession, that the Bar is a dying profession, that it holds no future for young men or young women. That was said to me 35 years ago. I don't think it was true then and I don't think it is true now. The Bar in this country traditionally has been the avenue to success and to service and achievement and contentment to great numbers of young men and a few young women. I think we should keep it so. I hope that nothing that I say suggests that I think standards should be lowered or that there should be some quick and easy method for getting into the Bar.

All I am suggesting is this: I do not think we look so well to the inquiring public when the inquiring public hears that we certify and classify and certificate

and approve law schools, and then give their graduates Bar examinations which oust a very large percentage of them and then ultimately pass those who have flunked.

I am informed by the President that there is a little delay in the appearance of *the* speaker of the morning, and so I'm in a position where I've been before where I am holding the fort for somebody else. I am now informed that the President of the University of Michigan has arrived and I'm not going to take any of his time.

But there is one more little matter about which I'd like to talk briefly It is one on which I know I should not speak, and I'm sure that my colleagues would tell me, if they were here, that judges should not talk on such subjects, but they are not here. Therefore, I will talk about it briefly.

This has to do with a reform in which I do not believe, the so-called Missouri Plan for choosing judges. You know what that means. It means—putting it very simply and over-simply—picking judges not by the traditional American method of election or appointment by the Governor, but by letting the Governor pick them from a panel and making the judge after a year or two run, as they say, against his record.

Of course, we New Yorkers are very parochial, very provincial, and I plead guilty to that. I have often wondered just how the fifteen million people in the State of New York would be qualified and equipped, after a year or two of a judge's performance to go to the polls and decide whether or not he has been an efficient and honest judge.

The court in which I sit hears and decides some 400 appeals a year, plus several hundred non-routine motions. How could it be thought that the great body of voters could be equipped to pass on the performance of one of our judges after a year or two? It baffles me. You know that in many of our decisions we are conditioned and controlled by rules of the common law to which we feel obligated to adhere. In a great many of our cases, we are interpreting statutes with the passage of which we have nothing whatever to do. In many of our cases we are passing on very technical questions of law, which anybody, lawyer or layman, would find it difficult to understand. I know we find them difficult to understand. And my personal, if I may say it, objection to the Missouri Plan comes down to this: I don't question that the plan might be a good one for selecting judges. I think perhaps if it had been adopted in the first place it might have produced better results than the traditional American Plan, but what I do object to is something which seems to be implicit in the arguments which favor this method of picking judges.

There is a necessary implication, it seems to me, that the present system, the system that has been in vogue in this State for a century, for instance, has produced the wrong kind of people. Now, I'm not making that up out of my head. That is a necessary implication, or a vague and unexpressed backgorund, for the agitation of the Missouri Plan.

I picked out of a law journal a clipping which the learned society reproduced apparently with approval, of some advertising matter that appeared in the State of New Mexico when a system much like the Missouri Plan was put before the voters for approval, and disapproved. This advertisement, and I haven't time to read it all to you, was supposed to set forth in parallel columns the tests of an ideal judge, and the test by which judges actually get to the Bench through political selection and election. On one side of this advertisement—and it is of no particular importance in itself because it appeared in an obscure newspaper, it became important only because I say it is reproduced by a learned legal society with apparent approval—on one side it is suggested that the Missouri Plan tests a judge, a judicial candidate, for integrity, character, legal ability, industriousness, or industry, adequate legal experience, compatible personal habits.

On the other side of the page is what appears to be what the writer thought were the tests that are applied in the present system of picking judges and here they are, some of them. "Has he been involved in any major public scandal? Is he on good terms with the political leaders of his party? In what way has he helped his political party in the past? Is he a good public speaker? And a good mixer? Can he make a decent contribution to the campaign fund? What connection does he have with pressure groups? Does he know enough law to get by on the Bench?"

Now, it would be easy to become emotional about that sort of thing, but im-

proper. None of us has any proprietory interest or vested right in the methods whereby judges are elected or re-elected, but I cannot believe that any Bar association, and I include the American Bar Association of which I am a lifetime and proud member, I cannot believe that any Bar association or professional group performs a service to the public when it suggests that the lawyers who come to the bench by the present system, come there because they are the favorites of venal political bosses, or because they make political contributions, or because their names appeal to particular minor minority pressure groups.

I think our people are entitled to be told what I conceive to be the truth, at least in the State of New York, that the judges that I know—and I know most of them in the State, at least on the so-called higher courts—that the judges who perform in this State, whatever may be the case elsewhere, are hard-working, honest men.

Now, it shouldn't be necessary for a judge to make this disclaimer but it seems to me sometimes that there is nobody else to make it. I read some time ago in a learned periodical, not a law magazine, an article by a writer, a teacher, a professor, who came out flatly for the so-called Missouri Plan. I wrote him a letter in which I suggested to him some of the reasons why I think the Missouri Plan is not necessarily a cure-all for what is wrong with our judiciary, and particularly, that I thought suggestions involved and implicit in the propaganda for the Missouri Plan are unfortunate and convey a false picture to citizens.

He wrote back and told me that that was the first time that he ever knew that there was a body of argument against this new method of selection of judges.

There is being kicked around, to use the phrase, a quotation from one of the speeches of Abraham Lincoln which is used for all purposes. It runs like this: "If this Nation is ever destroyed," said Abraham Lincoln, "it will be from within and not from without." I do not think this nation is going to be destroyed from within or without, but I think that its strengthening depends, in part, on keeping the people interested in, informed of, loyal to, and confident in, their political institutions, including the courts. I think that lawyers who sometimes worry excessively about Communism and other alienisms, would do better to devote themselves even more closely than they do, and many of them do, very closely, to improving, modernizing, and especially simplifying the processes of law, the operation of the courts, so that our courts may more and more become in honest fact what Mr. Vishinsky says the Russian courts are: "People's Courts."

I am very grateful for the opportunity of talking, perhaps too long, to an audience of this distinguished International Association, and Mrs. Desmond and I are both very grateful for your warm hospitality. To paraphrase a popular song, or a song that used to be popular, "There's no business like law business, no people like law people." Thank you very much. (Applause).

PRESIDENT SPRAY: Thank you, Judge Desmond for a very fine address. I'm sure that we are all interested in the problems of the courts. I may say to you that I had one experience here this morning that I have never had before and in fact never expected and that is to tell an appellate court judge how much time he could have. (Laughter).

There was one court that you mentioned that I'm particularly interested in and I'm sure some of the other members here would like to hear more about it some time and that's the court that tries these judges. I'd like to know who presides over that.

Mr. Stichter, would you come up?

I'm going to ask our Past President Wayne Stichter to introduce our next speaker. Wayne.

MR. WAYNE STICHTER (Toledo, Ohio): Thank you, Joe. Ladies and Gentlemen: It gives me special pride this morning to be called upon to introduce the next speaker because he and I were fellow students at Ohio State some years ago.

Following his obtaining his Degree of Bachelor of Arts in 1922, Harlan Hatcher became an instructor at Ohio State in the Department of English and at the very young age of 34 he had become a full professor of English in Ohio State. In 1944, he became Dean of the College of Arts. In 1948, he became a Vice President. During this period Dr. Hatcher became known by the students as an inspiring teacher and by his colleagues on the faculty as an able administrator, a man of reason who could get things done through coop-

eration and effective leadership. Not only an inspiring teacher, an able administrator, Doctor Hatcher became a distinguished man of letters. His high attainments in English and historical writings have made him one of the top scholars in our country. He is an author and an historian, Ohio's first place historian. He has written a number of books, some of which are *THE BUCKEYE COUNTRY, LAKE ERIE, WESTERN RESERVE,* and *THE GREAT LAKES,* and various books on modern contemporary drama.

And so when that great school that Milo Crawford likes to tell us about at Ann Arbor, that self-styled football champions of the West, decided to pick up the pursuit of learning, it was but natural that the University of Michigan would turn to Ohio State University and to our great Doctor Hatcher.

It gives me great pleasure, Ladies and Gentlemen, to present to you the President of the University of Michigan since September, 1951, Doctor Harlan Hatcher. (Applause).

Change With Stability

DR. HARLAN HATCHER
President, University of Michigan
Ann Arbor, Michigan

THERE are several reasons why I find it a very great pleasure to be your guests this morning. One is the association with so many friends. The second is a very personal one which I nonetheless would like to share with you since I have no competency in your field, and that is that my father-in-law was one of your brotherhood. He was William Reynolds Vance of Vance on Insurance, known to so many of you both at Minnesota and at Yale. And the third one is the privilege of sharing a few thoughts with a group of distinguished fellow citizens in these moments that are taxing our best thoughts, to find our sure way in this mid-century. And inasmuch as the legal profession in whatever area it may have specialized is of all of our citizens one most concerned with orderly development, I've chosen to speak to you this morning of the, to me, very important concept of "Change With Stability." As I read our time has arrived. It is perfectly clear that the thing that we are most seriously confronted with is the concept of explosive and revolutionary change towards ends which seem to us to jeopardize all that we hold sacred.

I take a text, or perhaps I should say, I make a citation, from one of the greatest of all legislators and jurists in the long history of man's effort to regulate and guide his conduct. It is a passage from Moses' exhortation to the children of Israel familiar, no doubt, to members of the Bar, which might have been spoken this morning to the children of today.

"Behold, I have taught you statutes and judgments, even as the Lord my God commanded me, . . . Keep them therefore and do them; for this is your wisdom and understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people."

I come before you primarily as a fellow citizen with a keen interest in the history of our people and their culture, with equal concern for the immediate problems which we face and the direction we are taking, and a dedicated absorption in the role and function of education in this great democracy.

My association with lawyers and teachers of law has been intimate and delightful; my reading in law has been limited to a few specific purposes. I once read a good deal of Blackstone's "Commentaries." It was both a surprise and a gratification to a writer and a student of letters to find that it actually had in passages a certain prose style not commonly associated with legal pens. I also discovered that it was an imposing social document that could be read with interest and profit by the layman. It is a remarkable report on the evolution of a society much simpler than our own, and it might well be inserted in a general college curriculum.

I took a cue from the experience and

applied it to good effect in teaching the Bible to a generation whose ignorance of that handbook of our forefathers is appallingly complete. The Old Testament runs along with sturdy excitement through the narrative of the patriarchs, but it usually breaks down and defeats the reader when the story is interrupted by the beginnings of the Law. But when the young student understands that the law follows the actions of men, that regulations grow out of the things that men have actually done and not in theoretical anticipation of the things they might possibly do, even the prosaic book of Leviticus and the legal sections of Deuteronomy come alive with meaning as a record of human conduct and the road over which our society has traveled to reach its present strength and weakness. There is, indeed, a cultural and general educational value in the reading of law which is being largely denied to or missed by the present generation of students. They are the poorer for it. Such reading is not only a valuable contribution to the understanding of the basic patterns of society, but also a solid background for ordering the necessary changes demanded by the emerging times.

This understanding is sorely needed in modern life. In fact, I don't know how we can get along without it and the wisdom which must be founded upon it. They are indispensable to the health and the survival of our democracy. We see all too vividly the penalties of ignorance. Hardly a day goes by without speeches, radio commentaries, articles and editorials on the surprised discovery that this is a great nation with world power, that it cannot isolate itself from the resulting responsibilities, that all this has come upon us so suddenly that we are bewildered by the problems it has created, and that we haven't the competence to handle them. Out of the same surprise and lack of the sense of history come the designations of World War I and World War II.

Those two cataclysms are near to us. They were indeed more extensive and destructive than anything that preceded them. They did give a violent wrench to our traditional habit of thought. But basically they were differences in degree and not in kind from previous experience. From the American point of view they were not World Wars I and II but something like XII and XIII. For every significant European struggle since the colonies were first planted on these shores has had its immediate reverberation on this soil. The armies have fought here as extensions of those conflicts. The only surprise which we have any right to indulge perhaps is over the rapidity of our development and the degree of our present responsibilities.

I do not minimize them. I do think we should be much more intelligently prepared for them. The materials for preparation are at hand, and have been. Unfortunately all surveys seem to show that our citizens, especially the young people from whom we may expect much, are woefully inadequate in their acquaintance and understanding of the history of the nation and the setting of this nation in the history of the world—European and Oriental. They have not sensed fully with their minds and their hearts the struggles through which we have come, the moments of crises we have met, the new directions which we have had to take from time to time, why we have taken them, and with what rewards and penalties.

More fundamental still, I fear the great golden American dream itself has not fully appeared to them, or shown brightly enough before them. We should never lose sight of the miracle that here for the first time in the history of civilization men were given the opportunity to create on this earth a new form of government and build a new world for the happiness and the hope of mankind. We should always remember that the miracle included a generation of men with inspired concepts of law and government, with heroic courage, and with administrative wisdom and patience to give form to the concepts and substance to the foundation of the republic. And furthermore, we should keep in mind that a part of the miracle was the fact that we were blessed with a succession of great leaders—Washington, Adams, Jefferson, Madison, Monroe, John Quincy Adams—who gave continuity to its beginnings until it had grown sturdy and erect in strength.

It did become strong in body and in spirit. It was able to withstand the internal storms that rose to threaten it, and to repel invasion from without. It kept to its central purpose and still remained flexible enough to absorb the shock of the vast and precipitate rush across the westlands to the Pacific. The remembrance and contemplation of that record and that

heritage should strengthen our spines and lift up our eyes in vision.

We have been so busy through the hurrying decades with filling in the broader plans that we have often worked for tomorrow without understanding and drawing proper strength from the mistakes and the triumphs of yesterday. So we have said with pride that we are a young, forward-looking nation, and with the phrase have excused our shortcomings. Older nations have taken up the designation, often with a less charitable connotation. They mean that we are immature and uncertain, ignorant and unskilled. They look upon us with something of the attitude of an anxious father or skeptical older brother watching the younger son step into the responsibility of the family business. They observe the fact that we are now heavily involved, for example, with deep commitments in the Orient, that our experience there has been slight, and that our educational system has largely ignored the culture, the social structures, the urgent economic and political problems, and, perhaps more importantly, the habits of mind of oriental peoples. We feel ourselves involved, without fully understanding why and how, and are deeply concerned with the resultant strain on our traditional social structure and our national economy.

We meet here amid all the stress and tensions that have been created by these heavy demands upon us, and by the urgent necessity of choosing directions toward the future without confident assurance of the path that has brought us up to this point. The stress and tensions are felt in every detail of our lives from the question of price support for potatoes to the war in once far-off Korea and the review of our role in the family of nations. I think I sense a fear of the unknown and the untried among our people. They have a deep foreboding of threats to our nation which have not yet fully defined themselves. They are apprehensive in the absence of sure and certain direction and confident leadership. They are concerned that we seem to be drifting at the mercy of forces over which we have not exercised firm and rational control.

These uncertainties furnish a fertile soil for suspicion and confusion, and lead too readily to hysteria and hasty or rash actions. They also create a favorable climate for false prophets who lurk at every crossroads and every wayside path. They offer alluring short cuts to the millennium which must be firmly rejected. They give orderly development with equilibrium the hard way to travel.

This is the general setting in which we are now living. We have to pick it up where we find it, but we are also duty bound by the law of God and the nature of intelligent men not to leave it in this state.

What do we do about it?

There are many things that must be done, but I wish only to suggest a few considerations on the role of the lawyer as a professional man and citizen in these times. It is a heavy and challenging role, for it involves high responsibility, beyond the strict call of professional duty, to help guide our people and keep them stable in the midst of the confusion of rapid change.

There is first of all the problem created for the lawyers by the demands made upon them professionally by the rapidly growing scope and body of the law itself. It would be commonplace to repeat to the Michigan Bar that the increasing complexity of modern life is giving rise to a massive body of law and a mountain of orders, rulings and regulations of all kinds and in such volume that the ordinary citizen is hopelessly at sea, and even the legal profession is taxed to capacity to keep abreast of them. Merely to mention the contrast between the training of Judge Woodward and the range of his counsel and that of the modern law firms, which you gentlemen represent, with their array of highly trained and specialized talent and scope of business, is sufficient to revivify the commonplace. As in other learned professions, the subject field of law has been accumulating and expanding by leaps and bounds, and, as in other fields, it is being catapulted through yesterday's horizon with baffling velocity.

Mastery of the general field and high competency in a special branch or two would seem to the younger student of law a heavy load in itself, and it is. But he must be ready for much more than that. Like the man of the Renaissance, he needs must take all learning to be his province as a continuing venture. For, by nature and by tradition the lawyers are, in an important sense, the custodians of the record of the long and arduous experience of generations of men in their attempt to learn how to live together, how to regulate their common affairs, and how to give

order and continuity to their experience. It is significant that the words law and order go naturally together. They stand for rational and controlled living with full respect for freedom and responsibility. They have been gained by tribulation, by toil, by trial and error, and by the exercise of judicial reason. In modern terminology they would be called the stockpile of usable human experience. Without them we would be lost in a wilderness without paths. With them as a line of defense and a guide to further advance, we may hope to proceed with confidence. For we must advance upon those threatening sectors of modern life which are not yet subject to the controls of law and order.

The legal profession, perhaps more than any other group in our society, has the natural bent and the supporting training to nourish these roots of our stability. It is steeped in precedent and schooled in continuity. Historians must delve into the past and preserve the wayward story of man's journey across time and the face of the earth. Though conscious of the direction of peoples and nations, their view is prevailing backward as they log the voyage after each specific segment has been completed. The scientist may disregard history in the professional sense and fix his gaze on the unknown. The record of Henry VIII is complete, and it has only a tenuous bearing on the present; the observations of Newton are only a new base from which further explorations may take off.

The law, on the other hand, must be a Janus in the discerning meaning of the Romans, the god facing to the east and to the west, looking back to the beginnings and forward to the emergent patterns of life. It must preserve what is sound and good in the old and it must create the new. It must select and discard, it must build and rebuild.

This is a large order, but it is not too big and it must be filled and delivered. The need is urgent. And if it is not filled and filled wisely by the legal profession, it will be filled unwisely by shoddy substitute, or capriciously by the undirected force of change.

The responsibility is, indeed, inescapable. On the national level about forty per cent of the House of Representatives is generally made up of lawyers, and about seventy per cent of the Senate. The judiciary is selected almost exclusively from the legal profession. And even when representatives from other walks of life seek to devise new laws or modify old ones, they rely heavily upon legal talent to guide and frame their intent. Few details of our life are without the guiding touch of the lawyer to some extent and in some fashion. The power of the bar for guidance is immense.

It is not enough to take the body of law as it presently exists and direct clients through its loopholes for their personal gains. I once heard Mr. Kettering tell the story of how two men sat down together and drew up a contract between them on the back of an envelope. They then referred it to a lawyer. His opinion was that it was a perfectly good and binding contract; the only trouble with it was that it said just what it meant, and there was no chance left for either party to get out of it if they should wish. Your fellow citizens tacitly assume a more exalted view of the function of the profession. This is witnessed by the fact that lawyers are called upon so constantly by them for such a wide variety of public service on trusteeships of educational and philanthropic institutions, on boards and civic enterprises.

The education of the lawyer must respond and it is responding, to his high calling in our society. We have only to mention the experience of our grandfathers reading law in the office of an older practitioner alongside the present requirements and elective offerings in a modern law school to underscore this point sufficiently. I have been intrigued to read the inscription at the entrance to the Lawyers Club at Ann Arbor: "The Character of the legal profession depends upon the Character of the Law Schools. The Character of the Law Schools forecasts the future of America." Implicit in the inscription is the recognition of this change and of the responsibility of the Law Schools in preparing men for this demanding profession.

With full recognition of this progress, I emphasize the continuing and constantly growing demands upon the men who are training for the profession and upon those who are already established. They must have that rare achievement of firm and exact scholarship and skill, combined with a broad liberal and general education, moulded and suffused with the spirit of justice and good will, wisdom and understanding. They must wrestle with the ever growing body of the law in all its bewil-

dering extensions into new fields. They must acquire a deep and thoughtful knowledge of human history, of the nature and workings of the physical universe and the biological forms that exist upon it, of the religions to which mankind has given allegiance, and of the literature through which the greatest spirits of our race have summed up their experience and voiced the aspirations of the human heart.

From the vantage point of this attainment, however, it is possible to acquire the perspective necessary to see the total sweep of things, to encounter the tensions of change with wisdom, courage and poise. It should enable us to make orderly adjustments to new requirements without tumbling into the pitfall of adopting the evils which we are forced to combat; or, to use the words and the authority of Roscoe Pound, "to reconcile the conflicting demands of the need of stability and the need of change." For, as all legal thinkers recognize, the legal order "must be overhauled continually and refitted continually to the changes in the actual life which it is to govern."

I view this need for wise and orderly development as the most urgent requirement confronting us. We have not fully realized the American Dream, but we have certainly advanced toward it. We have created here over the generations a way of life more favorable to man's dignity and happiness than any system yet devised. It appears especially precious against the backdrop of its world setting. Though it falls short of the dream, it has within it the right principles for further progress toward it.

It is the responsibility of education to see that this understanding is built strong in our on-coming citizens. It is the responsibility of the legal profession to balance and guide in this orderly evolution as it expresses itself in the law of the land. The work of this great organization is a good omen for the future.

We began with the words of Moses, and in conclusion we take further counsel from his wisdom:

"Only take heed to thyself, and keep thy soul diligently, lest thou forget the things which thine eyes have seen, and lest they depart from thy heart all the days of thy life: but teach them thy sons, and thy sons' sons . . . that they may teach their children."

(Applause).

PRESIDENT SPRAY: Thank you, Doctor Hatcher.

Our Past President Milo Crawford, would like to say a few words to you. He's an old friend of the Doctor's.

MR. MILO H. CRAWFORD (Detroit, Mich.): Wayne, here, kind of kidded me about going down to Ohio State to get a president for the University of Michigan. Speaking for the University of Michigan and for the State of Michigan, I want to say we now have a great educator there and a great American, my good friend President Hatcher. (Applause).

PRESIDENT SPRAY: Doctor Hatcher we are indeed all indebted to you for having taken the time to come over here and give us a very fine address and I again thank you.

I think the next matter on the agenda is the Report of the General Entertainment Committee.

MR. L. J. CAREY (Detroit, Mich.): The first report to be made is that of the winner of the Men's Bridge and Canasta prizes which I have been asked to make by Chairman Rogoski. I can see why because he seems to be one of the prominent winners here. He probably would have been embarrassed.

The first prize which I understand is a radio in the Bridge section, was won by Frank Ernst of Cleveland, Ohio. The other winners were: Second: William Buchanan of Detroit; Mearl Sweitzer of Wausau, Wis.; Alfred Kammer of New Orleans; Casper Ughetta of New York; Alex Rogoski of Muskegon; G. A. Farabaugh of South Bend; K. B. Hawkins of Chicago; Thomas Whaley of Columbia, S. C.

I understand that Mr. Rogoski is deeply interested in Bridge and not so deeply interested in Canasta, so when he came to assign John Wicker some prizes for the Canasta part of it, he just gave him one prize, so there's only one winner. That's a fellow by the name of James Fellers of Oklahoma City.

The next report of winners is that of the Men's Golf and Jimmie Donovan is here to tell you the whole story. I guess he has the prizes all with him.

MR. JAMES B. DONOVAN (New York, N. Y.): Ladies and Gentlemen: This is the part of the program when you can completely relax because I have nothing more serious to discuss than distributing the golf prizes and I'm very happy to report that in the best tradition of Home

Office counsel I can distribute this morning with very bountiful hand.

I would like to add that most of us have been through the experience of winning a golf prize and really needing a double boiler but instead getting a mustache cup, so as a result your Committee has decided that we would change the procedure a little this morning and as the prizes are distributed up here and we thought that the best thing would be that each man as he comes up will simply be perfectly free to select whichever of the prizes he believes most appropriate for his own needs and they are such that I'm rather confident that no one will be disappointed in his choice.

For those of us who struggled yesterday through that wind and rain, I think it's with a great deal of pride that we can report that the winner of the Men's Low Gross yesterday and as a result the winner of the King Cup which was donated as you know last year by J. Charles King, the winner was Mr. Kit Carson with a gross of 74. Mr. Carson. (Applause).

The Second prize for Low Gross was Mr. Will Sadler with a 77. Mr. Sadler. (Applause).

The Third prize for Low Gross was George Sullivan with a 79. Mr. Sullivan. (Applause).

Ladies and Gentlemen, we have so many winners today, so many people did so very well that I think the best thing would be for me simply to call off their names, announce their scores and then if each of them will simply come up and he can select whatever he wishes. The only reservation that we make is that no one can take more than a dozen golf balls.

The Low Net for yesterday we have a tie and the tie was between Mr. Humkey and Mr. Graham with a net of 70. Will they come forward please. (Applause).

Second prize for Low Net, Mr. Lucas with a net of 71. (Applause).

Fourth prize for Low Gross was Lee Thornbury with an 83. Mr. Thornbury. (Applause).

Fifth prize Low Gross was George Mitchell—85. Mr. Mitchell. (Applause).

For Third prize Low Net we again had a tie and Mr. Gallagher and Mr. Allan Gowan of Glens Falls tied for that prize with a net of 72. Mr. Gallagher and Mr. Gowan. (Applause).

For Sixth Low Gross the winner of last year's King Cup, Mr. Stan Burns with an 87. Mr. Burns. (Applause).

And for Seventh Low Gross Mr. Francis Van Orman with an 88. Mr. Van Orman. (Applause).

Eighth Low Gross, Mr. McCamey also with 88. Mr. McCamey. (Applause).

And Ninth, Mr. Ed Schroeder with an 89. Mr. Schroeder. (Applause).

And Tenth, Mr. H. White, also with 89. Mr. White. (Applause).

I can't quite decide whether the trouble here is that they don't have any of these things or they have everything. They can't make a choice, but we still think that it was a better way to distribute these prizes.

Next Low Net, Mr. Armstrong, with a net of 72. Mr. Armstrong. (Applause).

Next I'm happy to announce with a net of 73, John Kluwin. (Applause).

I am also happy to announce that as the Fourth Low Gross we have Tom Doucher with an 83. Tom Doucher. (Applause).

The next Low Net is Mr. Stratton with a net of 73. Mr. Stratton. (Applause).

Next also with a net of 73 is Mr. Reed and Mr. Anderson with a net of 73. Mr. Reed and Mr. Anderson. (Applause).

Also with a net of 73 is Mr. Knipmeyer. (Applause).

With a net of 74 is Mr. Vaughan, Mr. Kissam, Mr. Lacey, Mr. Cope, Mr. McLaughlin and Mr. Kitch. All of those gentlemen had a net of 74.

Now, grouped at 75 are so many men that I'll simply read off their names and I hope that they're all here because the first ones up are obviously the ones who will get one of the prizes, but first Mr. Baird, who is right here on hand; Mr. Mangin, Mr. Hannah, Mr. McDonald, Mr. Mount, Mr. Wiles, and again Mr. Anderson, this time it must be the other one; Mr. Faude, Mr. Dalzell, Mr. Master, Mr. Baird and Mr. McNeal. All those gentlemen had 75. (Applause).

Ladies and Gentlemen: That concludes the awarding of the Golf prizes and I think that I expressed the feelings of all who played golf this year in saying that we played on very beautiful courses and despite the fact that we did have some wind and rain here today I think we had a very good time and on behalf of the Golf Committee I thank you very much. (Applause).

PRESIDENT SPRAY: You know what impresses the President is that every one of these men happen to be present here to

receive their prize. John Anderson asked me to add that the winner with the net of 75 was no kin of his. He was Wilson Anderson.

There are one or two prizes left and those who weren't here to receive them can get them from Mr. Donovan, during the day.

Next Report of Committee is that of the winners of the Ladies Golf Prizes. Mrs. Lester Dodd, Chairman, will announce the winners. (Applause).

I want to say that some place along the line she may mention one of the winners as a Mrs. Dode trying to cover up, but that's herself. (Laughter).

MRS. LESTER P. DODD (Detroit, Mich.): I'd like to read the names of the winners of the Ladies Golf Tournament and as I read the names would you please come forward and claim your prize and if the ladies are not here, I wonder if the husbands would come and take the prizes because we'd like to dispose of them this morning.

First Low Gross, Mrs. Arthur Dodd of Detroit. (Applause).

Second Low Gross, Mrs. F. X. Cull of Cleveland, Ohio. (Applause).

First Low Net, Mrs. Stanley Morris of Charleston, West Virginia. (Applause).

Second Low Net, Mrs. V. C. Enteman, Newark, N. J. (Applause).

Third Low Net, Mrs. F. L. Kenney of St. Louis, Mo. (Applause).

Fourth Low Net, Mrs. Marvin Williams, Jr., of Birmingham, Alabama. (Applause).

And the winner of the blind hole, Mrs. Arthur Brandt of Detroit, Mich. (Applause).

For low put, Mrs. E. B. Raub, Jr., Indianapolis, Ind. (Applause).

And then we had a nine hole tournament and the winner of the Low Net in the nine hole tournament was Mrs. J. W. Stewart, Lincoln, Neb. (Applause).

And the Low put for the nine hole tournament, Mrs. H. E. Reynolds, Indianapolis, Ind. (Applause).

Then we had a special putting contest which was won by Mrs. Lewis C. Ryan, Syracuse, N. Y. (Applause).

The second for the putting contest was Mrs. Oscar Brown of Syracuse, N. Y. (Applause).

I'd like to take this opportunity of thanking my committee for their cooperation and help in running this tournament. Thank you. (Applause).

PRESIDENT SPRAY: I am sure that you folks will agree with me that that is one committee chairman that I appointed and I made no mistake. (Applause). Thank you.

Now, the Report of the winners of the ladies Bridge prizes and the Chairman of that Committee, Mrs. Pat H. Eager, Jr. (Applause).

MRS. PAT H. EAGER, JR. (Jackson, Miss.): The ladies Bridge prizes have already been distributed. The winner of the high bridge prize was Snow Anderson. The prize was given to her next of kin, Mr. John H. Anderson of Raleigh, N. C. She received sterling cream and sugar tray and Mrs. Lee H. Cramer of Columbus had the high Canasta score and received the same prize. The door prizes were won by Mrs. Robert C. Alexander of Dayton, Ohio, and Mrs. Gladys Howard of Worcester, Mass.

I also distributed 26 table prizes and found that I had 18 table prizes left over because the party was not as large as I had expected it to be, but it has never been my policy to return any change when a gentleman gives me money. So I asked the ladies to cut for all 18 prizes and distributed all of them and I hope the ladies had a good time. (Applause).

MR. L. J. CAREY (Detroit, Mich.): That concludes the reports of the prize winning contests and I just want to take this opportunity to thank all the members of the General Entertainment Committee that have given me so much assistance and the chairmen of the other committees, such as the Committee for the Reception for Wives of New Members, the Ladies' General Entertainment Committee and chairmen of the other committees that you have heard reports here this morning and I want to thank particularly some of the members of my committee, one in particular has done the yeoman job of detail that people do not like to take on and that's John Wicker, Jr. He handled the ticket distribution and all that sort of thing at the cabaret and it's a thankless job. The work is unseen but it must go on to put on that kind of a show. So I thank all the members of my committee and especially Johnny. (Applause).

PRESIDENT SPRAY: Thank you, Pat. I don't know whether you members appreciate the amount of time that the General Entertainment Committee has to

spend on a job of this kind. But I can assure you that Pat has spent a great deal of time and hard work in doing an excellent job and I want to thank you, Pat, and congratulate you and the members of your committee upon an excellent job well done. (Applause).

I have been informed that the management of this hotel will be happy to have any of the members of this Association return. Guest cards will be issued to you upon request.

I would now like to introduce to you the Past Presidents of this Organization and as your names are called, would you kindly come forward please.

George Yancey, who was president from 1932 to 1934. (Applause).

J. Roy Dickie, 1935 to 1936. (Applause).

Milo Crawford, 1938 to 1939. (Applause).

Oscar Brown, 1940 to 1941. (Applause).

Pat Eager, 1943 to 1944. (Applause).

F. Bill Baylor, 1944 to 1946. Bill was unable to come because of a tempestuous Federal judge who would not continue a case.

Lowell White, 1947 to 1948. Lowell was unable to be here on account of being engaged in trial and he was not able to continue his case.

Kenneth P. Grubb, 1948 to 1949. (Applause).

L. Duncan Lloyd. (Applause).

Jerry Hayes, 1939 to 1940. (Applause).

Paul McGough, 1946 to 1947. (Applause).

Wayne Stichter, 1950 to 1951. (Applause).

Thank you, gentlemen. (Applause).

I know that we're all interested upon what our Nominating Committee has to say, and Dunc, you're here. Give us your recommendations.

MR. L. DUNCAN LLOYD (Chicago, Ill.): As you gentlemen know, this is one of the most difficult jobs that any of us have to do because we have so much available talent. This year we were able to conduct our meetings with dispatch. Between 75 and 100 people called upon us and gave us their recommendations and they were most considerate because they did not come in for conversation of long windedness and they told us their recommendations and left.

We gave due consideration to all pertinent matters including, if you please, some geographical problems. There are many members of this Association who were suggested to us who are from the same states where other members live who are on the present personnel of the organization. As a matter of good judgment we thought this being an International Association that we should take into account the entire United States.

So for our report your Nominating Committee proposes the following officers:

For President-Elect, John Autrey "Tiny" Gooch, Fort Worth, Texas. (Applause).

For Vice President, Tom N. Phelan, Toronto, Canada. (Applause).

The President asks that each of you come forward as your names are mentioned. "Tiny," I don't know where he is, if you'll lead the way, the rest can follow you.

Mr. Phelan, will he come forward. Follow the little boy Gooch. (Applause).

For Vice President, Elmer B. McCahan, Jr., Baltimore, Maryland. (Applause).

For Treasurer, Charles E. Pledger, Jr., of Washington, D. C. (Applause).

For Executive Committee for a term of three years, John H. Anderson, Jr., Raleign, N. C. (Applause).

The next member of the Executive Committee, Edward B. Raub, Jr., Indianapolis, Ind. (Applause).

And the last member of the Executive Committee, George Arthur Blanchet, New York City. (Applause).

Mr. President, I therefore move that the nominations be accepted.

PRESIDENT SPRAY: Are there any further nominations?

MR. LLOYD: Will some member of my committee second the motion?

MR. OSCAR J. BROWN: (Syracuse, N. Y.): I second the motion.

PRESIDENT SPRAY: Thank you. All in favor.

MR. GERALD P. HAYES (Milwaukee, Wis): Mr. President, did the Nominating Committee name a Secretary?

MR. LLOYD: I think the gentleman from Milwaukee is correct because it's a foregone conclusion that John Kluwin has done such an outstanding job we took it for granted. I did not put it down there because we were afraid that the meeting was going to call for a report and didn't get it. I apologize also to Mr. Kluwin and to his senior partner, a former Past President of this Organization. (Applause).

Really this was just a stooge play so

you'd all recognize what a swell job John has done. (Applause).

PRESIDENT SPRAY: Are there any further nominations?

. . . Motion was made and duly seconded that the nominations be closed. . . .

MR. LLOYD: I'll call for the question.

PRESIDENT SPRAY: All in favor say "aye;" no. I congratulate you gentlemen and I congratulate the Association upon having chosen you. Thank you very much. (Applause).

Is George Yancey here? George, did you have a matter that you want to talk about?

MR. GEORGE W. YANCEY (Birmingham, Ala.): Mr. President, Ladies and Gentlemen: On behalf of the members of this Organization, and deep appreciation for the wonderful job that our retiring President has done, this last year, I want to present to him a bound set of the Journals which are here in front of him and I also want to take this opportunity of suggesting that it's a wonderful way to keep the Journal from getting out of your library to have them bound and if any of you are interested, we'll be glad to assist you in that connection. Thank you. (Applause).

PRESIDENT SPRAY: Thank you, George. I do greatly appreciate those bound volumes of the Journal. I can assure you that they're not going in my library, they're going to remain right in my own private office. And I am sure that they will constantly remind me of you and of the many other fine gentlemen of this Association.

MR. LLOYD: Mr. President, before Mr. Gerald Hayes calls attention to the fact that the Nominating Committee did not nominate a President, I want to publicly go on record there isn't any question but what Al Christovich will be our next President. (Applause).

PRESIDENT SPRAY: I want to take this opportunity to thank you, Dunc, and the other members of your committee for the excellent job that you did. I know that you spent a lot of time and you did an excellent job. Thank you very much.

Is Al Christovich here? (Applause).

I didn't expect to see you here, Al. I wonder if you will come forward, and will Pat Eager and Al Kammer escort Al to the rostrum. (Applause).

PRESIDENT SPRAY: Thank you. Al, it gives me great pleasure to present this to you. I now turn it over to you and God bless you and good luck. (Applause).

MR. ALVIN R. CHRISTOVICH (New Orleans, La.): Thank you very much, Joe. Fellow Members and Guests: I'm quite sure that all of you know what emotions and sentiments are throbbing within me at the moment. I have, of course, a sense of gratitude for the high honor which you have bestowed upon me. There is a sense, if you will, of humility and acknowledgment of my own limitations, there is a sense of pride within me that you have so signally honored me, and there is a feeling of prayerful hope that during the coming year I may make some small contribution to this glorious Association of ours. But my own emotions and my own sentiments are not important. What is important is that I do have sincerely a great consciousness of the responsibility that I am about to undertake. I am conscious of the fine history of accomplishment of this Association, its fine tradition, and I am deeply conscious of the distinguished array of gentlemen who have preceded me in this position and as I saw them lined up here this morning and take note of Joe here at my right, there comes upon me a feeling of apprehension lest I should not measure up to the goal that they have set and the fine leadership that they have given this organization.

I am conscious, too, of the fine relationship that exists between the insurance companies and the men who make up our organization, and I hope that that fine spirit will continue and it is certainly my desire that it should do so.

And lastly, I am conscious of our obligation as individuals and as an association to our Nation in a manner that was so eloquently and beautifully expressed on yesterday by Commander Wilson of the American Legion and again today by Dr. Hatcher and Judge Desmond, and so I say I am conscious of all of these things, and I shall dedicate such ability as I may have to preserve the fine tradition and the fine accomplishment of this great Association. Thank you again for the confidence that you have reposed in me. (Applause).

Now, I should like to reintroduce to you one of the most beloved, most able of the members of our organization, your President-Elect. "Tiny," come up and say hello. (Applause).

MR. J. A. GOOCH (Fort Worth, Tex.): I am completely out of character. For about 15 years I have been coming to

these things and as you all know, I've had fun. It seems that the pasture gate is not closed. I am deeply grateful for your confidence. I shall do the best I can. (Applause).

NEWLY ELECTED PRESIDENT CHRISTOVICH: Are there any announcements to be made? Is there any new business to come before this Convention?

If not, I would like to congratulate personally all of those fine men who have been elected as officers and members of the Executive Committee this morning. I shall rely heavily upon all of the resources and ability that they will give to this Association. We will meet this afternoon at two o'clock in the Sunset Room.

I should like to again remind you that we meet next year in Quebec. John Kluwin and I are leaving here tomorrow and we will have a conference with the management on Monday for the purpose of ironing out any details and making plans for a happy visit by all of you to Quebec.

Joe, are there any other announcements? If there are no other announcements, no new business—

MEMBER: There is one matter of business that I think has been overlooked. This morning there seemed to have been a general overlooking of the President who was calling on Past Presidents. He overlooked me. When the nominating chairman made his report, he overlooked Mr. Kluwin, and now somebody has overlooked Mrs. Christovich. I think she ought to stand. (Applause).

. . . The assembly arose. . . .

PRESIDENT CHRISTOVICH: Thank you so much.

MR. L. J. CAREY (Detroit, Mich.): Will you announce now that they can get refunds of those tickets from the cabaret, from Mr. Wicker outside here.

PRESIDENT CHRISTOVICH: Mr. Carey desires to announce that if anyone needs any additional money to go home and its in trusteeship here at the hotel, you may get the refund for tickets outside right in the lobby.

I shall entertain a motion to adjourn without day until Quebec. Do I hear such a motion?

. . . Motion was duly made and seconded that the Convention adjourn. . . .

PRESIDENT CHRISTOVICH: Motion is made; motion seconded. Any objection? So ordered. (Applause).

. . . The Convention adjourned at eleven fifty-five a.m. . . .

Report of Accident and Health Insurance Committee

LAST year's report of this committee was devoted entirely to a discussion of the new "Uniform Individual Accident and Sickness Policy Provisions Law," and although the general discussion of last year relating to the substance of the new law will not be repeated, in view of the importance of this legislative movement, the present situation in the states will be brought down to date.

The new law has now been enacted in the following states, in all of which it *may now* be used, with compulsory dates as shown:

States	*Compulsory Date*
Arkansas	January 1, 1955
California	January 1, 1957
Colorado	Now
Connecticut	Now
Illinois	January 1, 1955
Iowa	Now
Kansas	January 1, 1957
Maryland	Now
Michigan	January 1, 1956
Nebraska	January 1, 1956
New Hampshire	July 1, 1956
New Jersey	January 1, 1957
New York	July 1, 1956
Pennsylvania	Now
Virginia	July 1, 1956
Washington	September 1, 1956
Wisconsin	January 1, 1957

The bill was passed by the Massachusetts Legislature and went to the Governor for signature, but before approval, the bill was withdrawn by the Legislature reportedly for further study, this being the status at the moment this report is being prepared.

The framers of the bill originally dreamed, first, of absolute uniformity in all the states, and second, that the use of the new law would be compulsory on a nation-wide basis, approximately January 1, 1957. With very slight exceptions, the

first objective has thus far been attained almost 100 per cent, but the second point was asking too much of all of these United (but at times discouragingly otherwise) States.

We find that the new law is presently absolutely compulsory with regard to the filing and approval of new policy forms in the states of Colorado (which, however, permits the use of suitable riders on old forms), Connecticut, Iowa, Maryland and Pennsylvania.

However, two of our good and sovereign states wish to do it still differently, so we find that Kansas and New Jersey require that once a company has *elected* to file a policy form under the new law, then during the moratorium period before compulsion occurs such company cannot revert to filings under the old Standard Provisions Law.

In addition to the foregoing states where the law has been enacted, Texas permits its use, on an optional basis, by a *formal* department order, but in addition, the states of Delaware, Georgia, Louisiana, Mississippi, Nevada, Rhode Island and South Carolina have *actually approved* policies prepared under the new law and presumably will continue to do so. A few additional states *could* permit filings under the new law, but up to the time of this report have not actually done so.

Although the past year has been a so-called "off year" so far as legislative sessions are concerned, nevertheless a considerable amount of new disability legislation has arrived on the statute books (this includes late 1951 enactments and practically all of 1952 legislatively).

In addition to the usual miscellaneous changes regarding the licensing of agents, dates for filing reports, paying premium taxes, etc., there appears to have been a distinct trend of bills being introduced in various states to increase insurance taxes. In few instances have these bills been enacted, but there is reason to believe that the insurance industry will need to be very alert in the future to avoid having its tax load substantially increased. To develop this thought further would lengthen this present report too much, but the danger signals are flying.

The growth and development of new legislation, directly or indirectly, relating to group disability insurance has been tremendous. Among the states which have more specifically developed a group disability pattern are Idaho, North Carolina and Oklahoma.

Still speaking of group disability insurance, a number of states have reduced minimum participation to ten individuals (this representing reductions from 25, which figure had represented a previous reduction from higher figures). The authorization of blanket insurance is on the increase, covering groups such as volunteer firemen, athletic teams, etc., where it is not feasible to list the individuals by name but where the boundaries of the group are quite definite and certain.

Also the authorization to various governmental bodies, state, municipal and otherwise, to make wage deductions to pay all or part of group premiums has been on the increase.

All of these movements in the opinion of your committee are good and wholesome and in every instance where an additional individual is added to the list of those insured through private enterprise, compulsory government insurance is fended off just that much.

Respectfully submitted,

LESLIE P. HEMRY, *Chairman*
JOHN A. HENRY, *Vice Chairman*
WILLIAM W. CHALMERS
DUKE DUVALL
EDWARD B. RAUB, JR.
CLARENCE B. RUNKLE
R. W. SHACKLEFORD
V. J. SKUTT
JOSEPH R. STEWART
PRICE H. TOPPING
LESTER P. DODD, *Ex-officio*

Report of Automobile Insurance Law Committee

THE Automobile Insurance Law Committee met at intervals during the year, by correspondence, to formulate plans for and complete the annual report.

It was decided that the decisions of the past year were so numerous, and so often based on statutes and rules of law peculiar to the individual state, that even a care-

fully prepared annotation could serve no use to the association members.

Arrangements were made to assign a territory to each member of the committee. It was his duty to report on cases which he thought would be of general interest. These reports have been consolidated and are herewith submitted with the hope that the information may be of use and interest.

The Chairman desires to express his appreciation to P. L. Thornbury, Richard B. Montgomery, Jr. and J. Woodrow Norvell for their extensive research.

Medical Payments Coverage

Goodwin v. Lumbermens Mutual, Maryland 85 0 (2) 759.

Policy provided medical payments for injury caused by accident "while in or upon, entering or alighting" from automobile.

Four women went to parked auto for purpose of entering automobile and as they stood beside auto, one unlocked front door, opened it and was reaching in to unlock back door, another woman had hand on back door handle—when struck by another car.

Held one was "entering" and others "upon" the automobile, and all entitled to recover.

Duty of Guest in Automobile

Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. (2) 682.

It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless, to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest could be charged with contributory negligence.

Also *Sautter v. Poss,* 155 Neb. 62, 50 N. W. (2) 547.

Assumption of Risk by Passenger—Driver Intoxicated

Evans v. Holsinger, Iowa 48 N. W. (2) 250.

If guest voluntarily enters automobile knowing or having means of knowing that the driver has been drinking considerably, and driver is in fact intoxicated, and such intoxication, as reflected in his operation of the automobile is the proximate cause of accident, the assumption of risk doctrine applies and deceased passenger's estate cannot recover against driver for wrongful death.

Also *Agans v. General Mills,* Iowa 48 N. W. (2) 242.

Duty of Pedestrian With Green Light

Snyder v. Union Paving Co., 170 Pa., Super 112 84 A (2) 373.

A green light at a traffic intersection offers but a qualified permission to proceed and the pedestrian crossing in reliance thereon must continually be on guard for his safety.

Ashley v. Kilbourn, 333 Mich. 283, 52 N. W. 2nd 528.

Pedestrian crossing downtown street in Detroit started across with a green light, after making observation of traffic conditions. Walked thirteen feet and was struck. The Court held that the pedestrian was guilty of negligence as a matter of law in that he had a duty to continue his observation while crossing, and that this plaintiff did not do so while walking the distance of thirteen feet.

Presence of Other in Vehicle

Santore v. Reading Co., 84 A (2) 375.

Where owner of automobile is present while it is being driven in a negligent manner by another, the test of owner's liability is right of control, not whether he exercises it. He is not only liable for damages caused to a person by driver's negligence, but driver's contributory negligence is imputable to him to bar his right of recovery.

Ownership Registration Records

Gates v. Levers, 233 P. (2) 143.

The records of Motor Vehicle Department do not necessarily and conclusively establish true ownership.

Also *Hawkeye Casualty v. Stoker,* (Neb.) 48 N. W. (2) 623.

Registration certificate of an automobile is *prima facie* evidence of ownership which may be overcome by other evidence.

Emergency Vehicle Against Red Light

Holser v. City of Midland, 330 Mich. 581, 48 N. W. 2, 208.

In this case, the plaintiff's decedent entered an intersection with a green light and was struck by a fire engine. He was held to

be contributorily negligent as a matter of law.

The case is of particular interest because the Court held that the duty of the driver was not decreased, but rather increased by the fact that he had his radio on and there was not shown any necessity for his listening to the radio, or for the radio being on, and thus counteracting to some extent the noises indicative of danger.

Bad Faith

American Fidelity & Casualty Co. v. All American Bus Lines, Incorporated, et al, 190 Fed. (2d) 234.

American Fidelity and Casualty Company issued to Bus Company a policy of public liability insurance with maximum coverage of $10,000.00. Security Mutual Casualty Co. issued to Bus Company a policy of public liability insurance which provided coverage in excess of $10,000.00 but not in excess of $100,000.00. Both policies contained subrogation provisions.

An accident occurred and a passenger sued Bus Company and obtained judgment for $25,000.00, later settled for $17,500.00. Apparently Security did not know of claim until after judgment. American defended suit and before trial rejected a settlement offer of $5,000.00. After judgment American paid its policy limits of $10,000.00. Bus Company paid $7,500.00 and Security reimbursed the Bus Company.

At request of Security, Bus Company filed suit against American for recovery of the $7,500.00 on grounds that American acted in bad faith in rejecting the offer to settle for $5000.00. Trial court awarded judgment against American for $7,500.00. Case was appealed and opposite court reversed and remanded the case on the grounds that Bus Company was not real party in interest and that suit could not be maintained in its name. Security was substituted as real party plaintiff. Case was retried and again resulted in judgment against American on grounds that American acted in bad faith in rejecting the offer of settlement. Having so acted, American became liable to Bus Company and Security, having reimbursed Bus Company, became subrogated to right of Bus Company.

Primary v. Excess Carrier

St. Paul Mercury Indemnity Company v. Martin, et al, 190 Fed. (2d) 455.

St. Paul Mercury Indemnity Company issued its automobile liability to James Zigler with limits of 5000 bodily injury to one person and 10,000 bodily injury to two persons. The policy contained the standard provisions. Central Surety and Insurance Corporation issued its automobile liability to Eugene Martin with limits of 20,000 bodily injury to one person and 40,000 bodily injury to two persons. This policy contained the standard provision.

Clara Zigler, wife of James Zigler, and Martin were partners in the cafe business. An accident occurred while Martin was driving the Zigler car with Mrs. Zigler and two plaintiffs as passengers.

Suit was filed against James Zigler and Martin. Offer to settle for a total of $9500.00 was made by plaintiffs. Settlement was $6000.00 for one plaintiff and $3500.00 for other plaintiff. Central Surety demanded that St. Paul make settlement at the risk of paying the full amount of any judgment which might be rendered. Central Surety tendered its check for $1000.00 to plaintiff representing the excess over the St. Paul's liability on the $5000.00 coverage.

St. Paul brought a declaratory judgment action against Central Surety contending there was no liability on St. Paul because Martin was not operating the car with permission of the named insured. While this suit was pending, St. Paul and Central Surety entered into an agreement to settle the two damage suits for $9500.00 and to split the amount of the settlement between them, but the settlement was to have no effect on the declaratory judgment action. The court held that St. Paul was primarily liable under its policy up to the limits of its policy since Martin was operating the Zigler car with permission and that Central Surety was secondarily liable.

Towing Trailer

Pothier v. New Amsterdam Casualty Co., 192 Fed. (2d) 425.

Under automobile property damage policy clause providing that coverage did not apply while automobile was used for towing of any trailer owned or hired by insured and not covered by like insurance in company, but that policy did apply

when trailer being towed was utility trailer and not one used as a home, office, store, display or passenger trailer, two-wheel metal trailer, 12 to 14 feet in length, which was completely enclosed and had windows equipped with Venetian blinds, and which had doorway and sleeping facilities, was "home trailer" and insurance company was not liable for property damage which resulted from collision which occurred when automobile was towing such trailer.

Where automobile property damage policy expressly provided that its terms should not be changed except by endorsement signed by president, vice-president or secretary of company, and collision occurred at time insured automobile was towing trailer within morning of exclusionary clause of policy, in absence of evidence that company held out insurance adjuster as having authority to extend coverage of policy to include automobile while towing such trailers, company could under North Carolina law, defend action to enforce liability on policy on ground that automobile had not been covered at time of collision.

Interpretation of Property Damage

Royal Indemnity Company v. Olmstead, 193 Fed. (2d) 451.

Olmstead brought suit against Royal Indemnity Company to recover judgment against driver of rented car insured by Royal. Richardson rented car from Jordan and was involved in accident resulting in injuries to Olmstead. Olmstead obtained default judgment for $31,000.00 against Richardson and compromise judgment against Jordan for $3500.00. City Ordinances required liability insurance on all automobiles rented. Company attempted to defend on ground as provided by policy. Held this: no defense as the requirement of insurance was for benefit of public.

Limits of liability were $15,000.00 on account of personal injuries and $5000.00 on account of property damage liability. Judgment against Richardson was $25,000.00 for personal injuries and $6000.00 for loss of earnings and expenses incurred. Company paid consent judgment against Jordan of $3500.00 leaving $11,500.00 insurance coverage. Trial Court held plaintiff's estate and property were injured, wasted, destroyed, taken or carried away on account of expenses in the sum of $4357.00 and on account of loss of earning $1643.00. (This was the $6000 part of the default judgment) and that the $5000.00 property damage coverage applied to this coverage. The trial court therefore gave judgment against insurance company for $16,500. Court of Appeals held that property damage coverage not applicable to this judgment and nullified judgment accordingly.

Cancellation

Farmers Insurance Exchange v. Taylor, 193 Fed. (2d) 756.

Action by Taylor against Farmers Insurance Exchange organized under the law of Nevada to subject policy of public liability automobile insurance issued by defendant to judgment debtor of plaintiff to payment of such judgment. The Court of Appeals held that under Oklahoma law mere proof of mailing of notice of cancellation was not sufficient to show effective cancellation of policy, but insurer had burden of showing actual notice to insured by virtue of receipt by insured of notice of cancellation.

Allstate Insurance Co. v. Moldenhauer, 193 Fed. (2d) 663.

Action by the Allstate Insurance Co. against Moldenhauer to obtain declaratory judgment that plaintiff was under no duty or legal liability to defendants for injuries sustained by defendant who was injured by insured's automobile. Court of Appeals held that evidence sustained the finding that insured's failure to disclose a prior insurance cancellation the risk of the insurer and therefore, there was no liability on part of insurance company.

Insurer did not waive rights under policy by investigating accident under reservation of rights.

Where automobile liability policy provided in cancellation clause for 5 days notice in writing and required return of unearned premium, held failure to return premium left policy in force.

Barr v. Country Mutual Insurance Co., 345 Ill., App. 199, 102 N. E. (2) 656.

Romero v. Maryland Casualty Co., 54 So. (2d) 645.

This case involved a suit which was brought to recover on a policy of collision insurance issued by the Maryland Casualty

Company, a truck having been damaged in the collision. Defendant admitted that a policy had been issued but averred that in accordance with certain provisions of the policy it had been cancelled by the defendant company prior to the accident. In this particular case the agency which secured this policy and many others for the plaintiff paid the premium on this particular policy. The local insurance agency of the plaintiff had extended credit and paid the insurance company. The defendant, having decided to cancel the policy, mailed Romero a notice of cancellation in which it stated, "the policy herein sued on is hereby cancelled as of noon January 31, 1949. . . . " However, the company did not pay the unearned return premium to the plaintiff. The Louisiana Insurance Code, L. S. A. R. S. 22:636, provided that the portion of any premium unearned because of the cancellation must be paid to the insured or other person entitled thereto. The unearned premium was credited on his unearned balance due the local insurance agency instead of being returned to him. The court held that there had been a sufficient compliance with the requirements of the Code.

Crotts, Respondent v. Fletcher Motor Co., et al, Appellants, 219 S. C. 204, 64 S. E. (2d) 540, 36 Automobile Cases 457.

Defendant insurer cancelled insurance on plaintiff's financed car. Sent named insured notice of cancellation, but sent unearned premiums to finance company which had paid premium. Standard cancellation clause. Later plaintiff had accident and wants to recover on policy. Plaintiff claims never received notice of cancellation.

Held could recover as cancellation not complete until tender of unearned premium to the named insured. Issuance of credit memorandum to finance company not sufficient.

Elmore v. Middlesex Fire Insurance Co., 219 S. C. 520, 65 S. E. (2d) 871, 36 Automobile Cases 1146.

Plaintiff sues to recover on insurance policy for collision damages. Defendant claims cancellation of policy prior to accident. Notice of cancellation mailed but unearned premium credited to plaintiff's account to offset other premiums.

Lower court found for plaintiff. Affirmed. Tender of unearned premium is condition precedent to cancellation, therefore defendant still on risk.

(See *Crotts v. Fletcher Motor Co.,* 64 S. E. (2d) 540, 36 Automobile Cases 456; contra *Gibbon v. Kelly,* 156 O. S. 163).

Expiration

Boone v. Standard Accident Insurance Co. of Detroit, et al, 192 Va. 672, 66 S. E. (2d) 530, 37 Automobile Cases 2.

Plaintiff's policy expired February 10. Notice of expiration sent as well as invitation to renew. On February 15 plaintiff involved in collision. On February 21 plaintiff announced he would renew policy and paid part premium. Plaintiff claims that because of course of dealing he had properly relied on belief that prompt payment of premium not absolute prerequisite to coverage.

Lower court found for defendant. Affirmed.

Even if the course of dealing relied on by plaintiff did exist, the policy was not renewed until accepted by Boone on February 21 under basic contract law principles and therefore coverage did not exist at time of accident.

Simmons v. Motors Ins. Corp., 56 So. (2d) 480, Supreme Court of Mississippi.

In this case, the plaintiff sued upon a policy which the defendant insurance company alleged had expired. The court held that regardless of the fact that the defendant company granted credit to her upon the issuance of the policy that she was still under a duty to notify the company at the end of the year that she desired to renew the policy and to pay the premium.

Comprehensive; Theft and Fire

Rich v. United Mutual Fire Ins., 102 N. W. (2) 431.

Owner parked car on downgrade. Car later found smashed against tree at foot of hill. Held insured had burden of showing collision with tree caused by theft or vandalism.

Boman v. Insurers Ind. & Ins. Co., 242 S. W. (2) 160—Texas.

A person who obtained possession of insured's automobile and certificate of title through fraudulent pretext was not in lawful possession by bailment lease, mortgage or other encumbrance and was guilty of

theft within policy insuring automobile against loss by theft.

See also *Smith v. American Fire & Cas. Co.*, 242 S. W. (2) 448.

Allied American Mutual Fire Ins. Co. v. Wesco Paving Co., 243 S. W. (2) 141.

Where tank truck, while in process of being loaded with asphalt was demolished by an explosion which was an incident of a preceding fire, truck was destroyed by fire within coverage of policy insuring against loss caused by fire.

McDowell Motor Company, Inc. v. New York Underwriters Insurance Company, New York, 233 N. C. 251; 63 S. E. 2d 538; 36 CCH Automobile Cases 161.

Insured's sales manager allowed a prospective customer to take a car with him to show his wife. Neither he nor the car returned. Insurer denied liability for theft under insured's dealer's open policy because of an exclusion for loss in case insured voluntarily parted with possession whether or not induced by any fraudulent scheme or trick.

The court held that the exclusion relieved the insurer from liability for theft where the possession of the car was voluntarily surrendered to another with the right to exercise control thereof for a purpose of his own.

Millers Mutual Fire Insurance Association of Alton v. Parker, 234 N. E. 20, (2d) 341, 36 Automobile Cases 1061.

Plaintiff's car stolen from defendant's parking lot. Defendant had told plaintiff that he was not liable for fire or theft and also posted signs to same effect. Defendant required plaintiff to leave keys in car but claimed no liability for negligence because of contract.

Lower court held for defendant. Reversed. Business of parking operates in the public interest and contracts against liability for bailee's negligence are void and unenforceable.

White System of Alexandria v. Merchants Fire Assur. Corp. of New York, 53 So. (2d) 697.

This case held that a mortgagee under a loss payable clause in an automobile insurance policy which stated that any loss thereon should be payable as interest might appear to the insured or mortgagee, that the mortgagee could maintain direction action against the insurer. In this case, the court further held that where the insurer, prior to the time the witnesses took the stand and repudiated certain statements made to the insurer which lead the insurer to believe it had a valid defense, the plaintiff could not be permitted to recover attorney's fees or penalties under the Louisiana Revised Statutes.

In *Lee v. Travelers Fire Ins. Co.*, 53 So. (2d) 692, a fire policy was issued insuring a truck. The truck was destroyed by fire, and the insurer sought to avoid liability because of breach of material warranty contained in the policy. The breach of warranty was that the plaintiff did not disclose the fact that the policy was subject to a mortgage. As a matter of fact, it was subject to three additional undisclosed mortgages, and the court held that under the Louisiana Insurance Code, Sec. 15.02, L. S. A.—R. S. 22:692, that the defense was good, as there was an increase of the moral hazard under the policy at the time of the truck's burning.

Durback v. Fidelity, 85 A. 315, N. J.

Policy provided "to pay for any direct and accidental loss." Co-owner disappeared with car. Held no unforeseen event and no direct and accidental loss.

Collision

Blackwell, et al d.b.a. Shaim's Auto Finance Co. v. National Fire Insurance Co. of Hartford, et al, 234 N. C. 559; 67 S. E. (2d) 750; 37 Automobile Cases 686.

Action to recover on an automobile insurance policy for loss due to collision and upset. Defendant denies liability on the ground that loss occurred while insured was transporting intoxicating liquor in violation of law and endeavoring to escape arrest. Judgment for plaintiff, appealed.

Judgment affirmed since the policy contained no exception on the ground of denial of liability and the loss came within the terms of the policy.

Reinert v. Shelby Mutual Casualty Co., 101 N. E. (2) 250.

Where automobile policy provided for payment of each loss in excess of a deductible amount, and not in excess of cash value, fact that insurer paid insured cash value of automobile for one accident less amount of salvage, did not prevent a sub-

sequent claim by insured for a subsequent accident to same automobile after it was repaired.

Potomac Ins. Co. v. Wilkinson, 57 So. (2d) 158.

The Mississippi Supreme Court held that under a policy covering damage to an automobile there was not a total loss if the automobile could be repaired and at least be substantially restored to complete function; that the amount which could be recovered was the cost of the repairs necessary to restore the automobile to its condition and value on the date of the accident. The court further held that if despite repairs there yet remains a loss in actual market value, such deficiency is to be added to the cost of repairs. Interest in Mississippi could only be recovered from date of judgment.

Fifty-Mile Radius

Baldwin v. Tri State Casualty Ins. Co., 55 So. (2d) 43, Court of Appeals, First Circuit, Louisiana.

The defendant in this case issued a collision policy covering a truck and trailer tank. It was further provided in the policy that the vehicle was to be used for commercial purposes transporting gasoline. It contained a "territorial limitation" rider reading as follows:

> " . . . it is agreed that the regular and frequent use of the commercial automobile is and will be confined during the policy period to the territory within a fifty-mile radius of Winnsboro, Louisiana; that no regular or frequent trips are or will be made . . . beyond the territorial limit. . . . "

While the truck was on its way to New Orleans beyond the fifty-mile limit, it was damaged in a collision. The plaintiff contended that the trip was to have the tank calibrated, and that it was not a regular or frequent trip. In this case the suit was by the plaintiff for damage to his own truck. The court held for the defendant and said that the court is reluctant to avoid liability to injured third parties where such provisions exist in the policy, but where it involves property damage of the insured, the provisions in the policy would be enforced as written.

Johnson v. New Amsterdam Casualty Company, 234 N. C. 25, 65 N. E. (2d) 347, 36 Automobile Cases 898.

W. purchased liability insurance from defendant which limited use of truck to 50 miles radius of principal garage "excluding the area within cities and towns designated herein; and (2) No trips are customarily made by the automobile to any location beyond such radius or within the area of cities and towns designated therein. Cities and towns excluded: State of North Carolina."

In driving to South Carolina, W. collided with plaintiff, who sued. Defendant refused to defend and plaintiff recovered judgment for $1500. Plaintiff now sues to recover judgment. Lower court found for plaintiff.

Affirmed. Contract limits customary use of auto to 50 miles of principal garage, excluding areas in cities and towns in North Carolina and in that radius. Will construe language to include liability as contract drawn by insurance company. Also, even if all of North Carolina was excluded, contract permitted occasional trip beyond such area.

Reservation of Rights Agreement

Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. (2) 623.

Insurer and Insured entered into agreement that insurer's liability was doubtful but insurer would defend personal injury actions. Thereafter, Insurer commenced Declaratory Judgment action and unequivocally declared non-liability and invalidity of policy. Insured was held free from any obligation under policy and reservation of rights agreement.

Pre-Natal Injuries

Tucker, etc. v. Howard Carmichael & Sons, Inc., 208 Ga. 201, 65 S. E. (2d) 909, 37 Automobile Cases 269.

Suit by next friend against ambulance company for injuries sustained by unborn child who was born three hours later, when ambulance in which child's mother was traveling, collided with another car.

Upon demurrer by defendant, lower court dismissed on ground that no cause of action stated.

Reversed. Child may bring action on these facts even if unborn when injury occurred.

Notice to Insurer

Calhoun v. Western Casualty, 260 Wis. 34, 49 N. W. (2) 911.

Delay of eleven months held as a matter of law not given as soon as practicable.

Wehner v. Foster, 331 Mich. 113, 49 N. W. (2) 87.

In this case, there was a seven months delay. The Court reaffirmed its decision of *Kennedy v. Dashner,* 319 Mich. 491, in holding that an insurer must show prejudice to escape liability, but sustained the position of the defendant by reason of the insurer's inability to make a proper investigation.

Settlement of Counter-Claim

DeCarlucci v. Bresley, 16 N. Y. Super. 48, 83 A. (2) 823.

Plaintiff sued two defendants; one defendant cross-claimed against co-defendant and plaintiff. Before trial, plaintiff's insurer settled cross-claim of co-defendant. Motion was made to dismiss plaintiff's action thereafter as to defendant with whom settlement was made. Stipulation of dismissal of cross-claim was signed by attorney on cross claim defense and not plaintiff's attorney. Held plaintiff's right to maintain suit not abrogated by act of insurance company in which he neither participated nor consented.

Leaving Key in Parked Automobile

Cochrell v. Sullivan, 344 Ill. App. 620, 101 N. E. 878.

Owner left key in ignition in violation of statute; thief drove car away and had accident in flight. Held no liability as violation of statute was not proximate cause of damage to other car.

Driverless Car On Hill

Backard v. Vidal, Mass. 101 N. E. (2) 884.

Held *prima facie* case and plaintiff need not show specific act or omission of owner.

Appeal Without Supersedeas Bond

Whereas the following case is not strictly within the file of automobile insurance law, in our opinion it is a very interesting case and would be equally applicable to an automobile liability insurance policy. This is the case of *Ohio Casualty Ins. Co. v. Gantt,* 54 So. (2d) 595, decided by the Supreme Court of Alabama. The question in this case was whether or not a judgment will support an equity suit by the plaintiff against the defendant's liability insurance carrier, where the judgment was rendered in the trial court for a fixed sum against the insured in the policy but an appeal had been taken without supersedeas. When the suit in equity was filed by the plaintiff under the law of Alabama there is a statutory hypothecation of the claim of the defendant against his insurer to protect him against the liability to the extent of the coverage, and the Alabama statute confers upon the injured person a right to recover against the defendant's liability insurance carrier the insurance money provided for in the contract of insurance upon the recovery of a final judgment. The policy provided, as in most automobile policies, although this was a policy insuring against liability for the operation of an aircraft,

> "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of liability imposed upon him by law for damages . . . caused by accident arising out of the maintenance or use of an aircraft."

The court held that, since this was an appeal without supersedeas, there was a final judgment, and that a judgment for damages because of personal injury is final so as to justify collection thereof when no appeal of supersedeas is taken under the law and the policy. The court further held that the insurance company was liable for the injuries to a student airplane pilot when the policy insured against injuries to other than passengers since he was not a passenger.

Effect of Declaratory Judgment—In Other State—Direct Action Against Insurer

Churchman v. Ingram, 56 So. (2d) 297, decided by the Court of Appeals for the Second Circuit, La.

In this case a contract of automobile insurance was entered into in Texas between a Texas insurer and Texas residents. The Texans were involved in a collision with the plaintiff who was a resident of Louisiana. Texas Lloyds, a Texas insurance company, was also made a party defendant

as a liability insurer of the Texas defendant. Suit was brought against the insurer under the direction action statute of Louisiana, L. S. A.—R. S. 22:1. A judgment was obtained in the lower court against the defendant, Ingram, and the Texas company. Only the former appealed. The only issue before the upper court was whether or not the lower court was right in overruling defendant's plea and exception of *res judicata* and exceptions of no right of action. The plea of *res judicata* was based upon a declaratory judgment obtained in a judicial district court of Dallas, Texas, declaring that the policy issued by Texas Lloyds was null and void. The exceptions of no right of action were based upon the fact that the policy was issued to John W. Ingram, Sr., who declared that he was the sole owner of the vehicle and further that the policy was subject to Texas law with respect to joinder of parties defendant, and the Texas law prohibited the right of direct action against the insurer. The court overruled the pleas of *res judicata* on the ground that under Louisiana law all the parties in both actions had to be the same, and the plaintiff in this action was not a party to the action in Texas. The court held that the Louisiana statute provided for direction action against liability insurer regardless of whether the policy was written or delivered in Louisiana was a question of procedure, and that even though the accident happened before the statute was enacted and notwithstanding that the policy which was a Texas contract, and the Texas law prohibited direct action against the insurer, the plaintiff still had a direct action under Louisiana law. The court overruled the contention that such a provision impaired the obligations of contract and the constitutional guarantees of due process of law and was, therefore, unconstitutional. The court came up with the remarkable contention that *an automobile policy is not issued primarily for the insured but for the protection of the public.*

Respectfully submitted,

G. CAMERON BUCHANAN, *Chairman*
JAMES P. ALLEN, JR., *Vice-Chairman*
HAROLD A. BATEMAN
LAWRASON DRISCOLL
WILLIAM J. EGGENBERGER
RICHARD B. MONTGOMERY, JR.
J. WOODROW NORVELL
P. L. THORNBURY
ARTHUR GEAR
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CHARLES E. PLEDGER, JR.
H. BEALE ROLLINS
WAYNE VAN ORMAN
ALLEN WHITEFIELD
JOHN L. BARTON, *Ex-officio*

Report of the Aviation Law Committee

AT THE close of the 1951 meeting at the Greenbrier, your Committee met to fix objectives and assign responsibilities until the 1952 meeting.

It was agreed that George W. Orr would keep us apprised of developments as to the Warsaw and Rome Conventions. Roger Smith was assigned to maintain a watchful eye on any congressional legislature of interest. The rest of us were to note any cases of interest in the various reports.

Yeoman's service was given by Orrin Miller and L. Denman Moody in reporting decisions, which came to their attention.

Attached to this report is a summary of some of the more important decisions. These are included to "flag" the aviation law enthusiast rather than to furnish him with comprehensive details of the decisions.

George W. Orr's knowledge of the Warsaw Convention and the proposed Rome Convention is unsurpassed. He has prepared a thoroughly complete analysis of the 1951 draft of the Rome Convention Revision. This analysis is dated March 7, 1952, is in printed form and I am sure that copies can be obtained from George at U. S. Aircraft Insurance Group, 80 John Street, New York 38, New York. George makes a number of sound conclusions in that analysis, all of which are cogently reasoned and thoroughly documented. These are his views about the Rome Convention:

"After careful thought, the writer is reluctantly forced to the following conclusions: (1) that there is no necessity for this type of Convention—that it invades state

sovereignty in local matters, and (2) that the subject draft contains provisions inimical to the American concept of law and justice and to the decided detriment of air transport. More bluntly expressed, it needlessly contains provisions in direct conflict with established U. S. A. law—notably absolute or automatic liability, which is special interest preferment of one class (the general public) over another (that part of the public constructive enough to furnish air transportation by mutual associations known as corporations). It discriminates against air transport, by imposing upon it the burden of insurer of the public—with an inevitable increase in cost to the air carriers — and American air carriers are particularly discriminated against in that they, which fly most over the high risk, high-verdict territory of the U. S. A., get no protection whatever as to limit whereas foreign aircraft, mostly government owned and operated, get the protection of limited liability over the territory they most fear."

Respectfully submitted,
C. CLYDE ATKINS, *Chairman*
FORREST E. BETTS,
Vice Chairman
W. C. JAINSEN
W. R. MCKELVEY
ORRIN MILLER
ROGER H. SMITH
L. DENMAN MOODY
GEORGE WELLS ORR
PHILLIP J. SCHNEIDER
STANLEY C. MORRIS, *Ex-officio*

Paris Trust and Savings Bank v. United Airlines, et al, Superior Court of Los Angeles, California, February, 1951. In this case plaintiff sued for loss and destruction of baggage. Defendant filed motion for judgment seeking to dismiss so much of the complaint as exceeded the $100.00 limitation and also filed a demurrer to said complaint. The court decided that the clause limiting the baggage liability to $100.00 was valid and the carrier could have sought a summary judgment to pay only $100.00 but since the defendant's motion sought to seek a judgment dismissing so much of the complaint as exceeded $100.00 the motion was overruled. The general demurrer was sustained on the ground that the petition did not assert a cause of action within the jurisdiction of the court but plaintiff's counsel was given ten days to amend his complaint.

John Meredith v. United Airlines, United District Court, District of California, November, 1950. In this case plaintiff filed complaint in the Superior Court of California, Los Angeles County, which cause was removed to the Federal Court on the ground of diversity of citizenship. Plaintiff sought to recover from defendant on the ground that defendant had represented and warranted that the plane which the plaintiff was to ride in would be pressurized and that they failed to have the emergency door so fitted that it would seal the pressure, and that as a result of such breach of representation and warranty the plaintiff sustained injury to his ear and eardrum. The second cause of action was stated that defendant negligently failed and omitted to maintain the cabin of the plane sufficiently closed and sealed and such negligence resulted in plaintiff's damage. Defendant filed motion to dismiss the complaint on the breach of warranty on the theory that it did not state a cause of action and that the sole contract between the parties was the contract found in the local and joint passenger rules PR-2 approved and filed with the United States Civil Aeronautic Board. The court sustained defendant's motion concerning the cause of action on breach of warranty and dismissed this part of the complaint. Defendant also moved to dismiss the second count on the ground that plaintiff was not entitled to recover upon the count of negligence since written notice had not been given to the claim of injury within the 90-day period as provided by Rule 19-A of the above mentioned tariff. The court sustained the motion to dismiss the second count in plaintiff's complaint and gave plaintiff leave to amend as to the second count. Plaintiff amended alleging that written notice was given to the Airlines by mailing notice to the Airlines at Lockheed Air Terminal, Burbank, California, and also that the physician had advised the Airlines of the plaintiff's condition by a report that was within the 90-day period. Defendant filed a further motion to dismiss on the ground that the amended claim was not presented in writing at the *general offices* of the carrier as provided for in the tariff. Three affidavits were filed in support of the motion establishing that the general offices of the carrier were in Chicago and that no notices were given except those which were pleaded and therefore plaintiff failed to comply with Rule

17-A with reference to proper giving of notice at the General Offices of the carrier. The court sustained defendant's motion and dismissed plaintiff's cause of action.

Carl Cory, et al v. Troth Flying Service, 223 Pac. (2) 1008, Supreme Court, Kansas, November, 1950. This was an action against the flying school for fraudulent representation to a student that his life would be insured with respect to accidents occurring while he was a student, which was brought by the beneficiaries of which the insurance was supposed to cover. The court held that a suit for fraud or breach of an alleged contract could only be maintained by the personal representative of the deceased student and that the third party beneficiaries could not maintain an action on the theory advanced by them.

Johnson and Baird v. Central Aviation Corporation, et al, 229 Pac. (2) 114, District Court of Appeal, California, March, 1951. This is a suit by plaintiff against defendant for damage to plaintiff's DC3, which damage resulted from a student pilot of defendant taxiing into plaintiff's airplane. Plaintiff sued for cost of repairs, loss of use of plane while getting repaired, and loss of profit on plane as the result of having to sell it for a lower value. The trial court allowed the cost of repair but failed to allow any loss of use or loss of profit on the plane. The court on appeal held that the proper element of damage was not only the reasonable cost of repair but also the lost profit in the expected sale of the plane which was not made as the result of the accident and held that plaintiff should be permitted to prove, if they could, "a loss of gain upon a sale, as well as the loss of use of the plane during the time it was repaired."

Bright's Estate v. Western Airlines, 232 Pac. (2) 523, District Court of Appeals, State of California, June, 1951. In this case the estate of the decedent brought a cause of action against the defendant for wrongful death. The defendant filed an answer setting forth that the complaint did not state a cause of action in that the estate was not a legal entity and did not have a right to sue for the decedent's wrongful death, this cause of action belonging to the heirs at law of the decedent. The court sustained defendant's position and held that the estate of the decedent did not have the right to bring the suit for decedent's wrongful death.

Miller, et al v. County of Contra Costa, California District Court of Appeals, August 27, 1951. Miller rented plane from owner Boggess and took off from County Airport. In returning to the field Miller went into a ground loop in order to avoid collision with planes which were following him in for a landing. He attempted to take off again and had his plane airborne for about ten feet when it struck a mound of dirt which had been piled up by a bulldozer alongside the runway and covered by weeds which were growing over the mound of dirt. This mound of dirt caused the plane to crash, injuring Miller as well as the plane. Both Miller and Boggess brought suit against the County for damages. The County contended that the pilot Miller was guilty of contributory negligence in the manner in which he was making his landing and that since the mound of dirt was off the runway it was not a proximate cause of the accident. The trial court entered judgment for the pilot Miller for his damages, finding that he was not guilty of any negligence in making the landing and that the airport was guilty of negligence in allowing the dirt to be piled up along the edge of the runway without having warned the pilot of its existence. It denied recovery to the plaintiff Boggess, owner of the plane, on the theory that Boggess knew the dirt was alongside the runway and failed to warn the pilot before he rented the plane to him. On appeal the Appellate Court affirmed the judgment as to the pilot Miller and reserved the judgment as to the owner of the plane, remanding it to the trial court, with instructions that the trial court find Boggess guilty of no negligence and enter judgment for him against the County for the damages to his plane.

Lewis v. Jensen, et al, Supreme Court of Washington, September 5, 1951. This suit was by plaintiff, owner of an airplane, against defendant, operators of a repair business at the County Airport. Plaintiff had previously purchased airplane from defendants with an understanding that it would be checked after it had been flown approximately 25 hours. Plaintiff's brother-in-law flew into the airport for the purpose of purchasing gasoline and while there left the plane overnight with defendants for the purpose of checking it. During the night the plane was stolen by two persons who were intoxicated and in attempting to take the plane off crashed it,

destroying the plane. Plaintiffs sought to recover for the value of the plane against the defendants on the theory that they had instructed the defendant to park the plane inside the hangar and remove the key from the plane. The evidence showed that the key was left in the plane. Defendant introduced evidence to attempt to show that the intoxicated persons who stole the plane were familiar with the plane and could have started the plane whether the key had been left in it or not. The trial court held for the plaintiff and the case was affirmed on appeal. The court stated that even though it is probable that the intoxicated thieves could have started the plane without the key and under the present condition it would be pure conjecture as to whether or not they could have started the plane without the ignition key. The court on appeal found that the failure to remove the key was the proximate cause of the damage to plaintiff's plane.

The District Court here in Dallas County handed down an interesting decision last year which you may want to use. The case was not appealed and therefore there is no written opinion. Plaintiff brought suit against American Airlines for damages to a building resulting from the crash of the DC6 at Love Field. In addition to the actual negligence plaintiff alleged the cause of action on the theory of a trespass. After defendant had filed its cause of action plaintiff's attorney filed a motion for summary judgment on the ground that no defense had been set up to its cause of action for trespass against plaintiff's property. Both sides submitted briefs to the court and the court ruled that plaintiff was entitled to have his motion for summary judgment sustained and the only thing to be submitted to the jury would be the amount of damages. After this the case was settled and the case was never tried as to the amount of damages.

Recent Aviation Law Developments . . . Court Use of Cab Accident Investigation Data

Reference probably should be made to a recent decision in our district court here by Chief Judge Laws concerning the disclosure of information contained in reports of Civil Aeronautics Board accident investigators. In *Tansey v. T. W. A.*, D. C., D. C. 1950, 97 F. Supp. 458, Plaintiff moved for the production by the defendant of investigations and reports made by or furnished by the defendant to the Civil Aeronautics Board. Defendant objected on the grounds of privilege. In granting plaintiff's motion, the Court held that under Section 582 of the Civil Aeronautics Act and regulations promulgated pursuant thereto by the Board, the defendant was required to make a written report to the Board of the accident in question; that in practice, teams are appointed by the Board to gather evidence as to the accident; that each team is headed by a Board investigator, who is usually assisted by representatives of interested groups, including the aircraft operator; that such reports, under the terms of the statute (49 U. S. C. A., Sec. 581, Par. 2) were privileged and inadmissible in any suit growing out of any matter mentioned in the report. However, the Court indicated that although the report itself was privileged, there is nothing in the Act which prohibits the disclosure of information obtained in the course of a Civil Aeronautics Board investigation.

Also of interest is the decision in the case of *Reynolds v. U. S.*, 10 Cir. 1951, 192 F. 2d 987, affirming 10 F. R. D. 468, *certiorari* applied for 3-7-52. The Court affirmed the action of the district court in directing that certain facts were to be taken as established against the U. S. in a wrongful death action under the Tort Claims Act by three widows of deceased civilians killed in a crash of an Air Force plane, where the answer of the Secretary of the Air Force to a request to produce certain documents claimed that they were privileged by virtue of their being State secrets of a military character. The trial court entered an order providing for the determination by the Court of the Government claim of privilege as to any particular parts of the document, holding that it was not for the Executive Department of the Government to determine which of its own documents were privileged. As the United States refused on its election to produce the documents requested, the order of the Court followed, directing that certain facts were to be taken as established.

* * *

Also of much general interest to counsel defending aviation crash cases is the decision of *U. S. v. Caidys*, 10 Cir. 1952, 194 F. 2d 762. In this case, an action under the Federal Tort Claims Act for property damage as a result of the crash of a jet plane, the Court held that the doctrine of *res ipsa loquitur* did not apply, "it being

the view of the court that the accident might have occurred without negligence in the maintenance or operation of the plane." In this same decision, the Court held that violation of the C. A. A. safe altitude regulations constituted a trespass as to the owners of property flown over in violation of the regulations.

Stone v. Farmington Aviation Corporation, 19 Negligence Cases 184 (Missouri Supreme Court, July 10, 1951). The injuries sued for resulted from the crash of an airplane rented by plaintiff from defendant, and which plaintiff was then operating. The crash occurred when the plane struck electric power line wires. The petition alleged that the breaking of the defective safety belt was a direct and proximate cause of the injuries. The Court concluded that judgment for plaintiff was based on conjecture and speculation and that the facts were not sufficient to show that the breaking of the safety belt caused or contributed to plaintiff's injuries.

Linam v. Murphy, 19 Negligence Cases 134 (Missouri Supreme Court, September 11, 1950). A pilot instructor, on a training flight in a dual control plane who took the controls and despite the student pilot's protest "buzzed" the plane, was acting within the scope of his employment. The instructor's employers were held liable to the student for injuries received when the plane crashed as a result of the instructor's negligent operation of the plane.

Phillips v. Vrooman, et al, 19 Negligence Cases 615 (Missouri Supreme Court, April 9, 1951). The plane, in which appellant was a passenger, misfired during or shortly after the "take-off," which resulted in a "pancaked" crash landing, in which appellant was injured. An instruction to the jury, which stated that plaintiff was not entitled to recover, if the jury found, from the evidence, that the injuries were caused by an "accident, mischance, or misfortune," and not "due to any negligence on the part of the defendants," was prejudicial error since the cause of the injuries was known and the question was as to whether the respondents used ordinary care.

Walton v. Sherwin-Williams Company, et al, 19 Negligence Cases 994 (U. S. Circuit Court of Appeals, Eighth Circuit, August 15, 1951). Plaintiffs' cotton crops were damaged when a weed killer chemical, manufactured by defendant, was allowed to come in contact with the cotton plants while adjoining rice fields were being sprayed by airplane. The chemical was not applied in powder form but was mixed with oil. Defendant was not liable for the damage since the chemical was not inherently dangerous and the cause of the damage was the negligence of the persons who applied the chemical to the rice crops.

Johnson v. City of Corpus Christi, 243 SW2d 273 (Court of Civil Appeals of Texas, El Paso, June 27, 1951). In action by owner of airplane parked at municipal airport against city for damages to airplane caused by portable scaffold being blown against it during windstorm, evidence sustained findings that premises and scaffold were adequately inspected, that city was not negligent in failing to discover that scaffold had been removed from hangar and placed on outside, that the city could not have anticipated or foreseen that any employee would remove scaffold from hangar without authority, that city was not guilty of any act or omission constituting negligence, and that damage to airplane was result of unavoidable accident.

Report of the Casualty Committee

THIS COMMITTEE undertook for its 1952 report a survey, nationwide in scope, on "Failure of Insured to Cooperate" under Casualty Policies. The report herewith submitted embraces case law on the subject in the majority of state jurisdictions as reviewed by this Committee.

This report includes consideration of the following aspects of the problem: (1) The Purpose of the Cooperation Clause; (2) Its Validity and Scope; (3) What Constitutes Failure to Cooperate and the Effect of Breach of the Cooperation Clause. Major focus is placed upon the latter aspect of the problem.

Your Chairman is deeply indebted to Sub-Committee Chairmen E. D. Bronson, Frank X. Cull and J. Mearl Sweitzer and their Committees for their efforts and splendid work in making this report possible. The research work involved in the preparation of this report has been consid-

erable and the response of the Committee members has been indeed gratifying.

JAMES B. DONOVAN, *Chairman*
J. MEARL SWEITZER, *Vice Chairman*
A. L. BARBER
E. D. BRONSON
SANFORD M. CHILCOTE
FRANK X. CULL
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The Cooperation Clause

Liability policies customarily include among the conditions a provision commonly known as a "Cooperation Clause." The language of all such clauses is substantially uniform and reads, generally, as follows:

> "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

Purpose of Cooperation Clause

In undertaking to assume the legal liability of an insured under various forms of liability policies, it is essential that the insurer, among other provisions, include in the conditions of the policy some measure of control so as to enable the insurer to determine and preserve the facts which give rise to the basis of the claim, and thereafter to be in a position to use and present such facts to determine the liability of the insured and thereafter to make whatever disposition of the matter is indicated.

Validity and Scope of the Clause

The cooperation clause has universally been held to be valid and any question as to its legality should be considered settled. *Watkins v. Watkins,* 245 N. W. 695 (Wisc. 1932).

Although many courts have held the clause to be a "condition precedent" to liability of the insurer, it appears that a majority of the courts treat the condition as "subsequent," particularly on the question of pleadings and proof, by holding that a breach of the cooperation clause is an affirmative defense and that the burden of proof is on the insurer. *O'Morrow v. Borad,* 167 P. (2d) 483 (Cal. 1946); *Tuder v. Commonwealth,* 10 N. J. Misc. 1206, 163 A. 27 (1932); *Houran v. Preferred Accident Ins. Co. of New York,* 109 Vt. 258, 198 A. 253 (1937).

Upon the basis of public policy, the courts generally refuse to permit protection afforded by the insurance to be withdrawn and the contract avoided, unless the rights of the insurer have been substantially prejudiced by the insured's failure to cooperate, even going so far in some cases as to require that the insured demonstrate that the verdict was the result of the insured's breach of duty. To constitute a violation, it is usually held that there must be lack of cooperation in some material or substantial respect. The breach must be shown to substantially prejudice the rights of the insurer for the clause to have operational effect. Accordingly, the insurer can set up a valid defense to an action brought by the injured person only when it can be shown that the conduct of the insured constituted substantial prejudice to the insurer. *Margellini v. Pacific Automobile Insurance Co.,* 91 P. (2d) 136 (Cal. 1939); *Valladao v. Fireman's Fund Indemnity Co.,* 79 P. (2) 421, 89 P. (2d) 643 (1938).

Even though substantial prejudice is shown, the insurer must show that it diligently and in good faith complied with the terms of the policy. See the following California cases: *Jensen v. Eureka Casualty Company,* 52 P. (2d) 540 (Cal. 1936); *Panhans v. Associated Indemnity Company,* 47 P. (2d) 791 (1936); *Purefay v. Pacific Automobile Indemnity Exchange,* 46 P. (2d) 143 (1935); *Wormington v. Associated Indemnity Company,* 56 P. (2d) 1254.

The California Insurance Code, Paragraph 448, in effect states the rule of substantial prejudice for avoidance of the policy:

> "Unless the policy declares that a violation of specified provisions thereof shall avoid it, the breach of an immaterial provision does not avoid the policy."

An automobile insurer is not precluded from refusing to protect an insured who has breached the cooperation clause upon the theory that such action on the part of the insurer constitutes a "forfeiture" against the insured. See *Valladao v. Fireman's Fund Indemnity Company,* supra. See also: Civil Code of Calif., Paragraphs 3275 and 3369.

What Constitutes Failure to Cooperate and the Effect Thereof

CALIFORNIA

It is the duty of the insured to give a full, frank, and complete statement of the cause, conditions, and circumstances of the accident and the conduct of the parties at the time in order that the insurer may properly prepare its defense. *Valladao v. Fireman's Fund Indemnity Company,* 79 P. 2d 421, 89 P. 2d 643; *Porter v. Employers Liability Assurance Corp.,* 104 P. 2d 1087; *Margellini v. Pacific Automobile Insurance Co.,* 91 P. 2d 136.

The insurer is entitled to timely notice of the accident and to cooperation of the insured in investigating facts. *Woodman v. Pacific Indemnity Company,* 91 P. 2d 898; *Margellini v. Pacific Automobile Insurance Co.,* supra.

Prejudice to the insurer is presumed where insured fails to give a fair and frank disclosure of facts. *Margellini v. Pacific Automobile Insurance Co.,* supra. But the court may grant equitable relief against the cooperation clause where compliance with it results in hardship to the insured. *O'Morrow v. Borad,* supra.

Where insurer, after denying liability under the policy, offered a "courtesy defense" under the provisions of a non-waiver of rights, the insured did not violate the "cooperation clause" of the policy by refusing the defense and retaining his own counsel. *Norton v. Farmers Automobile Inter-Insurance Exchange,* 105 P. (2d) 136 (1940).

Under the cooperation clause it is not required to combine with the insurer to present a sham defense. *Porter v. Employers Liability Assurance Corp.,* supra. But the insured cannot arbitrarily decline to assist in making a fair, legitimate defense. *Bachman v. Independence Indemnity Co.,* 297 Pac. 110, rehearing denied 298 Pac. 57 (1931).

Unintentional and good faith misstatements of fact given to insurer by the insured does not constitute a failure to cooperate, and the insured is not prohibited from giving a truthful statement of facts and revealing policy limits to the claimant. *Porter v. Employers Liability Assurance Corp.,* supra.

The insurer is entitled to rely on defensive facts contained in answer verified by the insured, and to expect the insured to support such facts by testimony at time of trial. Where the insured testified to contrary facts, he was held to have violated the cooperation clause. *Wright v. Farmers Automobile Inter-Insurance Exchange,* 102 P. (2d) 352 (1940).

Failure of the insured to appear and testify on behalf of the defense usually constitutes a breach of the cooperation clause. But where the insured failed to attend trial, it was held not prejudicial to the insurer where the insured, had he testified, would have tended to establish liability for the accident. *Jensen v. Eureka Casualty Company,* supra; *Piggs v. International Indemnity Company,* 261 Pac. 486 (1927); *Hynding v. Home Accident Insurance Company,* 7 P. (2d) 999 (1932).

Where plaintiff and defendant are insured by the same carrier, and each had an affirmative claim against the other, they were excused from complying with the cooperation clause where they secured their own counsel and notified the carrier, on the grounds that it is against public policy for the insurer to control both sides of the litigation. *O'Morrow v. Borad,* supra.

Where the insurer denies liability to defend an injured person's suits against the insured, a breach of contract results, and insured is released from contract obligations, and is thus entitled to assume management of suits and make arrangements for his own defense. *Lamb v. Belt Casualty Company,* 40 P. (2d) 311 (1935).

The insured is not required to furnish an appeal bond or to otherwise jeopardize his position where the insurer is insolvent and desires to appeal. *Holmes v. Hughes,* 14 P. (2d) 194; C. C. P. 942.

Where the policy does not require the driver to cooperate in defending suit, his failure to do so does not constitute a defense in an action by the insured for coverage. *Bachman v. Independent Indemnity Company,* supra.

The insurer was not liable for the payment of attorneys' fees of an insured who prosecuted a declaratory relief proceeding against the insurer, where insurer claimed

a breach of the clause where the insured retained his own attorney because both parties were insured by the same carrier, since it was not necessary that the insured proceed in a declaratory relief action inasmuch as he could have had the issue determined in ordinary legal procedure by proceeding to trial in collision case and, if not successful there, to maintain an action thereafter on the policy. *O'Morrow v. Borad,* supra.

CONNECTICUT

Evidence that an additional insured under an automobile liability policy did not send insurer the papers served on him, or comply with insurer's request to keep in touch with it, or appear for trial is sufficient to support a jury finding that additional insured breached the cooperation clause of the policy, and that insurer's failure to enter appearance for additional insured was not a waiver of its right to insist that he cooperate with insurer. *Curran v. Connecticut Indemnity Company of New Haven,* 20 Atl. (2d) 87, 127 Conn. 692 (1941).

It is the burden of the insured, or one claiming through him, to prove performance of the conditions of a casualty policy. Mere inadequacy or untruthfulness of a statement made by the insured to the insurer is not of itself a breach of the cooperation condition; any conduct of the insured, to constitute a breach, must have adversely affected the insurer's interest in a material way. *Rochon v. Preferred Accident Insurance Company,* 171 Atl. 429, 118 Conn. 190 (1934).

Insurer's counsel's request for a continuance, when insured failed to appear for trial, was denied, and he continued with trial, without notice either to insured or to plaintiff. Held, his conduct constituted a waiver of the insurer's right to disclaim on account of the insured's breach of the policy. *Goergen v. Manufacturers Casualty Insurance Company,* 166 Atl. 757, 117 Conn. 89 (1933).

Insurer, under cooperation clause, is entitled to a truthful statement of the facts of an accident upon which a claim against its insured is based, in order to determine whether to contest the claim. A false statement made deliberately is a breach of the cooperation clause and relieves the insurer of liability under the policy. *Rochon v. Preferred Accident Insurance Company,* 158 Atl. 815, 114 Conn. 313 (1932).

Insured's testimony at trial differed materially from the information given insurer in a statement taken a few days after accident. Held, that in the absence of a finding that he wilfully gave the insurer false information or testified falsely, failure to cooperate was not shown. *Guerin v. Indemnity Insurance Company of North America,* 142 Atl. 268, 107 Conn. 649 (1928).

DELAWARE

Insured's testimony at trial differed from information given insurer in a statement given insurer shortly after accident. Counsel for insurer continued defense of action without disclaimer or reservation. Held, that whether insured's conduct constituted a waiver of the cooperation condition, and if so, whether insurer had waived its right to disclaim were questions of fact for jury to decide. *Brooks Transportation Company, Inc. v. Merchants Mutual Casualty Company,* 171 Atl. 207, 36 Del. 40 (1933). The foregoing rules are based upon the instructions given the jury at the trial of the above case, which was not taken to the Supreme Court of Delaware. No other Delaware case on the cooperation clause appears in the reports.

ILLINOIS

In a declaratory judgment action the insurer was held not obliged to defend the insured where the latter by his acts, conduct and conflicting and false statements misled the insurer. Such action on the part of the insured constituted failure to cooperate. *Metropolitan Casualty Insurance Co. of N. Y. v. Richardson,* 81 F. Supp. 310 (S. D. Ill. 1948).

Where insured departed from jurisdiction in order to be near his son in armed forces, and where insured was not advised to keep in touch with insurer, held, no failure of cooperation or breach of condition precedent. *Durbin for the use of Ferdman v. Lord,* 329 Ill. App., 333, 68 N. E. (2d) 537 (1946).

Additional insured driver of an automobile covered by the omnibus clause of a policy is not excused from complying with the cooperation clause, and his failure to notify the company and furnish information is a defense in an action against the company. *Zitnik v. Burik,* 395 Ill. 182, 69 N. E. (2d) 888 (1946).

In attachment action against the com-

pany upon judgment against the insured, defense that insured had changed his address several times and insurer had not been able to locate insured raises a question of good faith on part of both insured and insurer and constitutes a jury question. *Duffy v. Ft. Dearborn Casualty Underwriters,* 270 Ill. App. 143 (1933).

Failure of additional insured to give notice of suit where ignorant of provision in policy requiring that notice be given, held, not a defense in action against the company upon judgment obtained against additional insured. *Scott v. Inter-Insurance Exchange,* 352 Ill. 572 (1933).

Where the insured was the only witness available to the defense, the insurer was not liable under attachment proceedings where insured refused to appear or aid insurer in defending the claim. *Schneider v. Autoist Mutual Insurance Co.,* 346 Ill. 137, 178 N. E. 467 (1931).

The insured's duty of cooperation in giving notice is one of "reasonableness" and a jury question. *Harrison v. U. S. Fidelity & Guaranty Co.,* 255 Ill. App. 263 (1929).

Insured's delay in giving company notice of accident waived by company where company entered into correspondence inquiring as to facts of the occurrence. *Boston Store v. Hartford Accident & Indemnity Co.,* 227 Ill. App. 192 (1922).

INDIANA

The Committee has been able to locate only one Indiana case dealing with the cooperation condition.

DeHart v. Illinois Casualty Company, 116 F. (2d) 685 (1940), held that where the insurance company continued to defend the action against the insured after it learned that the insured had procured false testimony in his favor, the company could not later assert the defense of lack of cooperation on the part of the insured.

IOWA

Where an insurance company gave notice of non-liability under its contract of insurance, and thereafter entered into an agreement to defend a suit brought against the assured, without waiving any of its rights, it did not operate as a waiver or estop the insurer from denying liability under the policy. *McCann v. Iowa Mutual Liability Ins. Co. of Cedar Rapids,* 231 Ia. 509, 1 N. W. (2d) 682 (1942).

While assured was bound in good faith to observe the terms and provisions of policy, he was not bound to do any act not in good faith, to testify falsely or to aid appellant in a trivial, technical or sham defense. *Glade v. General Mutual Insurance Ass'n of Des Moines,* 216 Ia. 622, 246 N. W. 794 (1933).

KANSAS

The Committee has been able to find only one Kansas case dealing with the cooperation condition of the Policy.

Brandon v. St. Paul Indemnity Co., 294 Pac. 881 (1931), held that where the insurer continued to defend the action against the insured after the insured has disappeared, the insurance company waived the breach of the cooperation condition.

LOUISIANA

Lindsey v. Gulf Insurance Company, 7 So. (2d) 757 (1942). This case held that the question of whether there has been a failure of the insured to cooperate, is a question of fact and the purpose of the clause is to protect the insurer against the risk of collusion between the insured and persons claiming damages. Cooperation is excused if improperly demanded by the insurer, and does not include assistance of a sham defense, nor require that insured testify falsely, or favorably to the insurer.

In *Fields v. Union Automobile Insurance Company,* 135 So. 276 (1931), the insured's failure to sign proof of loss held not to violate Cooperation Clause.

MAINE

To relieve the insurer for liability for a judgment within the terms of its policy the insured must willfully misinform the company concerning essential facts or act in collusion with the plaintiff in an attempt to defraud the company by refusing to testify truthfully or by testifying falsely as to the facts of the accident. Mere mistakes in the insured's statement to the insurer or unimportant variances between that statement and his testimony at trial will not relieve the insurer of liability. *Medico v. Employers' Liability Assurance Corporation,* 132 Me. 422, 172 Atl. 1 (1934).

In *Rumford Falls Paper Company v. Fidelity & Casualty Company,* 92 Me. 574, 43 Atl. 503 (1899), it was held that, under an employers' liability policy requiring cooperation of the insured, particularly in ef-

fecting settlements, the insured was justified in employing all legitimate means to persuade the insurer to accept an offer of settlement within the policy limits.

NOTE: Under Sections 261 and 262 of Chapter 56, Revised Statutes of Maine, 1944, the liability of a casualty company, for a loss within the terms of its policy, becomes absolute on occurrence of an accident for which its insured is responsible. Section 262 lists the defenses available to an insurance company defending an action against it under these sections. Failure of the insured to cooperate with the insurer is not a defense. Fraud and collusion between the judgment creditor and the insured is a defense.

The *Medico* decision, as well as the statutes, make it appear that a mere breach of the cooperation condition, without more, is not a defense to an action on a liability policy under Maine law.

MASSACHUSETTS

At trial of action against insured by her sister, insured in her testimony repudiated in material respects information given insurer's investigator a few days after accident. Insurer promptly notified insured that she had breached policy, that it would continue defense of action until it was concluded, and that insured was at liberty to engage counsel to protect her interests. Held, the intentional furnishing of false information of a material nature either before or at trial was a breach of the cooperation clause in the policy, and that insurer by continuing to handle the action to a conclusion under a full reservation of its rights had not misled the insured and hence was not estopped from disclaiming liability. *Salonen v. Paanenon et al,* 71 N. E. (2d) 227 (1947).

That insurer's attorney, expecting insured to be present at auditor's hearing in action against insured by injured person, as insured had promised, continued defense of insured until the hearing was completed, when attorney withdrew and insurer disclaimed, did not constitute a waiver of insurer's right to disclaim or estop it from exercising such right. *Birnbaum v. Pamoukis et al,* 17 N. E. (2d) 885 (1938).

Defendant insurer, which disclaimed liability and withdrew from defense of actions against its insured when insured refused to cooperate with insurer's attorney or to testify at trial, held not liable to judgment creditors. *Goldberg v. Preferred Accident Insurance Company,* 181 N. E. 235, 279 Mass. 393 (1932).

An insurer which continued defense of action, including conduct of trial, after its insured had refused to attend trial, held to be estopped from disclaiming liability on account of insured's failure to cooperate. An oral statement to the insured that his refusal to testify is a breach of the policy is not a disclaimer of liability. *Daly v. Employers' Liability Assurance Corporation,* 168 N. E. 111, 269 Mass. 1 (1929).

The foregoing cases make it clear that the Massachusetts courts will enforce the cooperation condition commonly appearing in casualty policies. These cases do not apply, however, to Massachusetts Motor Vehicle Liability policies issued pursuant to the Compulsory Automobile Insurance Law, so called. Failure to cooperate is not a good defense, under such a policy, in an action brought by a judgment creditor to reach and apply the proceeds of the policy. See Section 112, 113 and 113A of Chapter 175 of the General Laws of Massachusetts, Tercentenary Edition, as amended.

MICHIGAN

In an action against the insured based on an automobile accident which occurred while his son was driving the automobile, it was held that failure of the insured to attend the trial was not a breach of the cooperation condition. The court felt that since the named insured was not an occupant of the car at the time of the accident, he could not have offered any testimony pertaining thereto. There was a strong dissent. *Kennedy v. Dashner,* 30 N. W. (2d) 46 (1947).

Where the insured denied in statements to the insurance company that he had any connection with the accident, and then during the trial of the case admitted to the insurer that his car struck the plaintiff, it was held that there was a breach of the cooperation condition by the insured. *Brogdon v. American Automobile Insurance Company,* 287 N. W. 406 (1939).

Shortly after the accident the insured gave statements to the insurer in which he stated that the accident was caused by another automobile forcing him off the road. Two weeks before the trial the insured admitted that such statements were false. The cooperation clause in the policy provided that "the assured shall per-

sonally appear in court in the trial of any cause brought against the assured, and when requested by the company, shall aid in effecting settlements, securing evidence, the attendance of witnesses, and in prosecuting appeals." The court pointed out that the cooperation clause in the policy was not similar to cooperation clauses in other cases which held under similar conditions that there was a breach of the cooperation condition. The court concluded that there was no breach of the cooperation condition. *Bernadich v. Bernadich,* 283 N. W. 5 (1938).

MINNESOTA

Defendant failed to comply with insurance contract, refused to aid the insurance company in defending the action, wilfully misinformed it concerning essential facts and was engaged in assisting the plaintiff by refusing to testify "to the real facts of the accident." Held, a breach of the cooperation clause. *Bassi v. Bassi,* 165 Minn. 100, 205 N. W. 947 (1925). See also, *Barry v. Sill,* 191 Minn. 71, 253 N. W. 14 (1934); *Christian v. Royal Insurance Company,* 185 Minn. 180, 240 N. W. 365 (1932).

MISSISSIPPI

The insured must give notice of claim, forward to insurer process served and is required to cooperate to confer a valuable right on the insurer. Compliance therewith is required unless waived or properly excused. *Aetna v. Walley,* 174 Miss. 365, 164 So. 16 (1935). See also *Travelers Indemnity Company v. Hullam,* 174 Miss. 220, 164 So. 36 (1935).

MISSOURI

Inconsistent statements as to who was driving the automobile at the time of the accident did not show mere technical violation of the cooperation condition not prejudicial to the insurer's rights, but such statements were a good defense and showed active collusion to defraud the insurer, and the company was not liable under the policy. *Redler v. Travelers Insurance Company,* 117 S. W. (2d) 241 (1938).

The failure of the insured without just cause or excuse to appear in court at the time of the trial of the action against him constituted a breach of a cooperation condition of the policy. *Fischer v. Western and Southern Indemnity Company,* 110 S. W. (2d) 811 (1937).

The failure of the insured to appear in court at the trial of the damage suit against him, notwithstanding that he was not a witness to the accident, was a breach of the policy condition requiring "all possible cooperation and assistance." *Bauman v. Western and Southern Indemnity Company,* 77 S. W. (2d) 496 (1934).

Where the insured did nothing more than notify the company of the accident, it was held that this was insufficient compliance with the policy condition requiring cooperation by the insured. *Nevil v. Wahl,* 65 S. W. (2d) 123 (1933).

The insured's unexcused failure to fulfill the policy condition requiring cooperation with the insurer prevented his recovery under the policy of the amount of the judgment paid by him. *Finkle v. Western Automobile Insurance Company,* 26 S. W. (2d) 843 (1930).

NEW JERSEY

Insured must comply in a reasonable and substantial manner with the terms of the liability policy requiring cooperation with the insurer, act in good faith, and make fair, frank and truthful disclosures of information to the insurer, so as to enable the latter to determine if a genuine defense exists. *Bradford v. Commonwealth Casualty Company,* 158 A. 840, 10 N. J. Misc. 301 (1932).

If facts in a statement by the insured are due to an honest mistake, or if the true facts were disclosed prior to trial and the insurer was not prejudiced thereby, the discrepancies would be excused. *Peterson v. Preferred Acc. Ins. Co. of N. Y.,* 176 A. 897, 114 N. J. L. 180 (1935).

When it appears the insured has given the company all the information he possessed, and that other witnesses are available to conduct an adequate defense, the non-appearance of the insured at the trial has been held not to relieve the insurer. *Tuder v. Commonwealth Cas. Co.,* 163 A. 27, 10 N. J. Misc. 1206 (1932).

Non-compliance with a cooperation clause constitutes an affirmative defense as to which the insurer has the burden of proof. *Tuder v. Commonwealth Cas. Co.,* supra.

Where insured gave a detailed statement of the accident which tended to exculpate him from negligence and later, shortly before trial, gave a further written statement admitting the falsity of the first statement and revealing negligence on his part, held,

not a breach of the cooperation clause. *Rockmiss v. N. J. Mfrs. Assn. F. Ins. Co.,* 112 N. J. L. 136, 169 Atl. 663 (1934). See also the following cases concerning cooperation clauses: *Ambrose v. Indemnity Ins. Co.,* 12 A. (2d) 693 (1940); *Rasinski v. Metropolitan Cas. Ins. Co.,* 189 Atl. 373 (1937); *Fagan v. Hartford Acc. & Ind. Co.,* 114 N. J. L. 281, 176 Atl. 388 (1935); *Hutt v. Travelers Ins. Co.,* 110 N. J. L. 57, 164 Atl. 12 (1933); *Whittle v. Associated Ind. Corp.,* 33 A. (2d) 866 (1943); *Parodi v. Universal Ins. Co.,* 26 A. (2d) 557 (1942).

NEW YORK

The insured has a duty of substantial compliance with the terms of the liability policy requiring cooperation with the insurer. This requires frank and truthful disclosure of information to the insurer to enable it to determine if liability exists. *Solomon v. Preferred Acc. Ins. Co.,* 132 Misc. 134, 229 N. Y. Supp. 258 (1928); *Seltzer v. Indemnity Ins. Co.,* 169 N. E. 403, 252 N. Y. 330, (1929); *Shafer v. Utica Mutual Ins. Co.,* 248 App. Div. 279, 289 N. Y. Supp. 577 (1936).

Failure, because of disappearance, to receive requests from the insurer for reports, does not excuse failure to cooperate. Absence or non-availability of insured is *prima facie* a breach of the policy. *Shalita v. American Motorists Ins. Co.,* 266 App. Div. 131, 41 N. Y. S. (2d) 507 (1943).

Under what is sometimes known as the New York Rule, the question of whether or not the testimony at the trial is false is not decisive. Rather it is held the insurer has the burden of showing a breach of cooperation, and testimony which is materially variant from statements previously made by the insured is clear evidence of such a breach. *Briskman v. Glens Falls Ind. Co. of Glens Falls,* 251 App. Div. 319, 296 N. Y. Supp. 519 (1937); *Albert v. Public Serv. Mut. Cas. Ins. Corp.,* 266 App. Div. 284, 292 N. Y. 633, Aff'd 55 N. E. 2d 507, 42 N. Y. S. (2d) 124 (1944).

Insured's refusal to surrender the control of the defense of a case is a violation of the cooperation clause. *Utterback-Gleason Co. v. Standard Acc. Ins. Co.,* 179 N. Y. S. 836, 193 App. Div. 646, Aff'd 184 N. Y. S. 862.

If the insured has not complied with the cooperation clause, the injured person cannot recover over against the insurer, at least unless the breach be waived. *Cohen v. Metropolitan Cas. Ins. Co.,* 233 App. Div. 340, 252 N. Y. S. 841 (1931). See also the following cases concerning cooperation clauses: *Beaudry v. Mass. Bond. & Ins. Co.,* 22 N. Y. S. (2d) 866 (1940); *Alsam Holding Co. v. C. T. M. I. Co.,* 4 N. Y. S. (2d) 498 (1938); *Johnson v. Employers' Liab. Assur. Corp.,* 249 App. Div. 906, 292 N. Y. Supp. 913 (1937); *Gilbert v. Indemnity Ins. Co.,* 169 N. E. 403, 252 N. Y. 330, (1929); *Rushing v. Commercial Cas. Ins. Co.,* 167 N. E. 450, 251 N. Y. 302, (1929); *Hermance v. Globe Ind. Co.,* 221 App. Div. 394, 223 N. Y. Supp. 93 (1927); *Miller v. Union Ind. Co.,* 209 App. Div. 455, 204 N. Y. Supp. 730 (1924); *Schoenfeld v. N. J. Fid. and Pl. Gl. Ins. Co.,* 203 App. Div. 796, 197 N. Y. Supp. 606 (1922); *Roth v. National Auto. Mut. Cas. Co.,* 202 App. Div. 667, 195 N. Y. Supp. 865 (1922); *Upton Cold Storage Co. v. Pacific Coast Cas. Co.,* 162 App. Div. 842, 147 N. Y. Supp. 765 (1914); *Wenig v. Glens Falls Ind. Co.,* 61 N. E. (2d) 442, 294 N. Y. 195 (1945).

NORTH CAROLINA

Insured's rights under an automobile liability policy requiring cooperation with insurer by attending hearings and trials, assisting in effecting settlements, securing and giving evidence, etc., attach on happening of accident subject to defeat by substantial failure to cooperate in matters essential to defense of action on the policy. The cooperation clause in an automobile liability policy cannot be so interpreted as to render it a mere device to entrap the insured on a technicality so arbitrarily weighted as to destroy insurer's obligation to defend. *MacClure v. Accident & Cas. Ins. Co.,* 229 N. C. 305, 49 S. E. 742 (1948).

OHIO

Mere failure of the insured to appear at the trial of the action against him is not proof of lack of cooperation. The insurance company has the burden of proving a breach of the cooperation condition. *Ermakora v. Dearborn National Cas. Co.,* 37 Automobile Cases 735.

Where the insured misrepresented the facts concerning the accident and gave the claimant's attorney a sworn statement after he had been told by the company's attorneys not to do so, and the statement given to claimant's attorney was favorable to the plaintiff's case and contradictory to the statement the insured had previously given to the company, held that the insured had

breached the cooperation condition of the policy. *Travelers Indemnity Company v. Cochrane,* 98 N. E. (2d) 840 (1951).

The allowance of a claim against the deceased insured by the administrator was a breach of the cooperation condition of the policy. In Re *Basmajian's Estate,* 52 N. E. (2d) 985, (1944). And where the insured confessed judgment against himself in a malpractice action, it was held that he breached the cooperation condition of the policy. *Miller v. Jones,* 45 N. E. (2d) 106 (1942).

The insured refused to sign the answers prepared by the insurance company's attorneys, demanded that the company pay the insured's guests for the injuries they sustained while riding in his automobile, and showed a general interest in having the guests recover. It was held that there was a breach of the cooperation condition of the policy. *Luntz v. Stern,* 20 N. E. (2d) 241 (1939).

Where the insured gave false testimony in the trial of the action against him so as to assist his mother in securing a verdict against him, it was held that he violated the cooperation condition of the policy. *Beauregard v. Beauregard,* 10 N. E. (2d) 227 (1937).

OKLAHOMA

Insurer is entitled to an honest statement and honest cooperation by insured under the policy. *Buffalo v. United States Fidelity & Guaranty Company,* 84 F. 2d 883 (1936).

Non-cooperation of insured held established as a matter of law in action against insurer by person injured, where insured admittedly misrepresented to insurer facts respecting accident. *United States Fidelity & Guaranty Company v. Wyer,* 60 F. 2d 856 (1932), cert. denied, 287 U. S. 647.

PENNSYLVANIA

Insured must comply in a reasonable and substantial manner with the terms of a liability policy requiring cooperation with the insurer. *Conroy v. Commercial Cas. Ins. Co.,* 292 Pa. 219, 140 Atl. 905 (1928).

Variance of testimony at trial from pretrial statements must be with conscious intent to deceive. An innocent inaccuracy or mistake is not a breach of the cooperation clause. *Donaldson v. Farm Bureau Mut. Auto. Ins. Co.,* 339 Pa. 106, 14 A. 2d 117 (1940).

When it appears the insured has given the company all the information he possesses, and that other witnesses are available to conduct an adequate defense, nonappearance of the insured at the trial will not relieve the insurer of its obligation under the policy. *Graham v. U. S. Fid. & Guar. Co.,* 308 Pa. 534, 162 Atl. 902 (1932).

The insurer is released from responsibility under its policy requiring assured to cooperate with it in its defense of claims if, knowing facts of value to defense of case against him, assured wilfully conceals them and falsely asserts complete lack of knowledge of the facts. Such deception amounts to failure to cooperate within the meaning of the policy. *Rosenthal v. Radetsky,* 314 Pa. 255, 22 D & C 194, aff'd 171 A. 567 (1934).

Where insured automobile owner and one of the plaintiffs in an action against the insured were the only witnesses to the accident, and the insured absconded prior to trial, action of absconding was a breach of the cooperation clause and precluded recovery from the insurer of the judgment against the insured. *Cameron v. Berger,* 336 Pa. 229, 7 A. (2d) 293 (1938).

Failure to furnish necessary papers to the insurer does not of itself avoid the policy, in absence of prejudice to the insurer, and such prejudice does not exist *per se. Frank v. Nash,* 166 Pa. Super. 476, 71 A. (2d) 835, (1950).

SOUTH DAKOTA

Insurer did not have express right to require attendance of insured at the trial, but had the right to her assistance and cooperation under the terms of the liability policy. *Murphy v. Hopkins,* 68 S. D. 494, 4 N. W. (2d) 801 (1942).

Where the insurer, after knowledge of breach of any condition of the policy which might support a forfeiture, recognizes the continued validity of the policy, it elects to waive the forfeiture and treat the policy as in full force and effect. *Ziegler v. Ryan,* 66 S. D. 491, 285 N. W. 875 (1939).

TEXAS

Insured must cooperate and show by competent evidence that proof of loss was filed with insurer in substantial compliance with policy or that insurer waived such requirement by denying liability. *West American Insurance Company v.*

First State Bank, 213 S. W. (2d) 298 (1948). See also, *American Fidelity & Casualty Company v. Williams*, 34 S. W. (2d) 396 (1931); Vernon's Ann. P. C. Art. 430A.

VIRGINIA

Suit on a judgment against an additional insured under an automobile liability policy. After occurrence of accident additional insured left scene of accident, denied to insurer that he had been involved in accident and did not give insurer notice of suit against him until day before trial. Held, additional insured had violated cooperation clause of policy and that it was not necessary for insurer to show it had been prejudiced by his default to establish a breach of condition relieving it of liability. Held further that the provisions of the Virginia Financial Responsibility Law do not apply to an automobile liability policy, "except as to liability thereunder incurred after certification thereof as proof of financial responsibility." *State Farm Mutual Automobile Insurance Company v. Arghyrus*, 55 S. E. (2d) 16, 189 Va. 913 (1949).

After disclaimer of coverage by insurer, insured is no longer bound by cooperation condition. *Hunter v. Hollingsworth*, 185 S. E. 508 (1936).

The question of whether insured complied with cooperation condition was held to be one of fact for jury, when testimony on that point was conflicting. *Indemnity Insurance Company of North America v. Davis Adm'r*, 143 S. E. 328, (1928).

An insurer which continued to handle claim arising out of an automobile accident after it had knowledge that its insured breached a policy condition, waived its right to disclaim coverage. *Fentress v. Rutledge*, 125 S. E. 668 (1924).

The foregoing decisions indicate that the Virginia courts will give effect to the cooperation clause in liability insurance policies. In an action brought under a liability policy by a judgment creditor, the latter stands in the shoes of the insured, unless his action is based on a policy of automobile liability insurance subject to the Virginia Financial Responsibility Law. See Michie Code, 1942, Section 4326a.

VERMONT

Insured must comply in a reasonable and substantial manner with the terms of a liability policy requiring cooperation with the insurer. Cooperation requires frank and truthful disclosure of information to the insurer. *Francis v. London Guar. & Acc. Co.*, 100 Vt. 425, 138 A. 780 (1927).

WEST VIRGINIA

Insured falsely represented that he was driving the car at the time of the accident and that the injured party was a passenger. The fact was that the injured party was driving and his own negligence caused the accident. Held, insured breached the cooperation clause and insurer was released from liability for expense incurred by the insured in successfully defending the action brought against him. *Roberts v. Indemnity Ins. Co.*, 114 W. Va. 252, 171 S. E. 533 (1933).

"Cooperation" within the meaning of the cooperation clause in an automobile liability policy, means that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. *Ohio Farmers Indem. Co. v. Charleston Laundry Co.*, 183 F. (2d) 682 (1950).

One driving the insured's automobile with consent of the owner owes the insurer the same duty to cooperate in defense of an action arising out of his operation of the automobile as is imposed upon the owner by the terms of the liability policy. *Marcum v. State Auto. Mut. Ins. Co.*, 59 S. E. (2d) 433 (1950).

WISCONSIN

The insurer claimed that the insured breached the cooperation condition of the policy by failing to give the company notice of his removal and change of address. The court held that in order for the insurer to disclaim liability upon the ground of failure of the insured to give notice of a change in address, the insurer must have exercised reasonable diligence in ascertaining the insured's whereabouts, and that this is a question of fact for the jury and cannot be decided by the court as a matter of law under a motion for summary judgment. *Heinbecher v. Johnson*, 45 N. W. (2d) 610 (1951).

Refusal of the driver of the automobile to give a statement to the insurer without first consulting his attorney was not a refusal to cooperate so as to constitute a breach of the cooperation condition. *Tolsma v. Miller*, 9 N. W. (2d) 111 (1943).

Refusal of the insured to execute a reservation-of-rights agreement or a non-waiver agreement was not a breach of the cooperation clause. The policy involved here was a public liability policy. *Wisconsin Transportation Company v. Great Lakes Casualty Company,* 6 N. W. (2d) 708 (1942).

In signed statements given to the insurance company, the insured stated that the accident was caused by another automobile coming in the opposite direction which crowded him off the road. However, the insured refused to verify the answers drawn up by the insurer's attorneys which incorporated those facts and refused to give the insurer any assistance in preparing for the defense of the action against the insured. The court held that if the statements of the insured were false, then they were intentionally false and constituted a breach of the cooperation condition; and if the statements were true, then the insured wholly failed to cooperate by refusing to verify the answer in accordance with the statements, and that such failure amounted to breach of the cooperation condition. The court also held that the conduct of the defense of the acion against the insured by the insured after the insurance company refused to defend the action because of alleged failure to cooperate strongly pointed to non-cooperation on the part of the insured. *Jenkinson v. New York Casualty Company,* 6 N. W. (2d) 192 (1942).

Where the additional insured was unable to attend the trial and left the jurisdiction under army orders without notifying the insurer, held, that since the additional insured did not voluntarily absent himself from the trial of the case there was no breach of the cooperation clause. *Reynolds v. Wargus,* 2 N. W. (2d) 842 (1942).

Where the named insured and additional insured signed statements to the effect that the additional insured was using the insured automobile for hire at the time of the accident, and it later developed that this was not true but that the statements were made at the request of the representative of the insurer, held that the named insured and additional insured were not guilty of failure to cooperate with the insurance company because of the signing of such statements. The court said that if they were guilty of anything it was over-cooperation. *Buchberger v. Mosser,* 294 N. W. 492 (1940).

Where the insured signed statements and testified at the trial that the accident was caused by a car coming toward him on the wrong side of the road, and after the trial the insured told the attorney representing him and the insurance company that he had testified falsely and that there was no other car involved, the court held that the false testimony and false statement of how the accident happened was a breach of the cooperation clause and prejudiced the insurance company, because it probably would have settled the case rather than defended on the merits. A new trial was ordered. *Hoffman v. Ladutzke,* 289 N. W. 652 (1940).

Where the insured told the insurer that on the night of the accident he had been playing cards at his sister's house, and that he had not been drinking, and he procured statements to that effect from his sister and from a companion, but these statements were false and the insured had spent the evening in taverns consuming considerable amounts of liquor, the court held that the procuring of false statements was securing misinformation rather than information and was a breach of the cooperation condition, as was the insured's concealment of his drinking prior to the accident. *Hunt v. Dollar,* 271 N. W. 405 (1937).

Although the court did not have to determine whether or not there was a breach of the cooperation condition because the holding was that the insured was not negligent, it did make the following statement concerning the cooperation condition of the policy: "If insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision." *Watkins v. Watkins,* 245 N. W. 695 (1932).

In depositions taken before trial, the insured materially changed his story on how the accident happened from what he told the insurance company in statements shortly after the accident. The insured also conveniently presented himself in Illinois so that the plaintiff, the insured's brother, could get service on him to bring the action in Illinois. The insured also permitted his brother to get a default judgment in Illinois. The Wisconsin Court held that the insured breached the coop-

eration condition of the policy. *Buckner v. Buckner,* 241 N. W. 342 (1932).

Where the policy required the insured "at the request of the insurer" to assist in the defense, and the insured disappeared after giving notice to the insurer of the accident, held that there was no breach of the cooperation condition because the insurer had not requested the insured to assist it. The court neglected to say how the insurer could have requested the insured to assist it in the defense where the insured had disappeared. However, since the court held that the plaintiff could not directly sue the insured because of the "no action" clause of the policy, and since the plaintiff did not have service on the insured, the court probably was not too concerned with the alleged breach of cooperation on the part of the insured. *Fulleylove v. Holmes,* 237 N. W. 95 (1931).

Report of the Financial Responsibility Laws Committee

THIS report supplements the Committee's previous reports as to the legislative developments in the various states as to Financial Responsibility Laws generally, printed in the July 1948, October 1949, and October 1951, issues of the Journal. See also the report in the July 1950, issue, as to unsatisfied judgment funds.

Legislative Developments

1. *"Security" Laws.* Since the last report of the Financial Responsibility Laws Committee, the following states have enacted "security" laws:

State	*Citation*	*Effec. Date*
Alabama	Act No. 704, Reg. Ses., '51	Jan. 1, 1952
Mississippi	Sen. Bill 7, Reg. Ses., '52	Jan. 1, 1953
New Jersey	Chap. 173, Laws, 1952	Apr. 1, 1953
R. Island	Sen. Bill 58, as amended, Regular Session, 1952	Jan. 1, 1953
South Car.	Chap. 752, Laws, 1952	Jan. 1, 1953
Texas	House Bill 219, Reg. Ses. 1951 (Article 6701h) 1952 Supplement to Vernon's Texas Statutes, Jan. 1, '52	

The report of the Financial Responsibility Laws Committee, as published in the July 1951 issue of the Journal, reflects the Texas legislation cited above, but this legislation had not been enacted at the time when the report was submitted.

As a result of this new legislation, the only state left without any legislation of this type is Louisiana. (Bills for such a law are pending in the current session of the Louisiana Legislature). Furthermore, only eight states are left with the older type of financial responsibility laws. A list of these eight states follows. There has been no change with respect to these states since the last report of the Financial Responsibility Laws Committee.

Arkansas	New Mexico
District of Columbia	North Carolina
Kansas	Ohio
Missouri	South Dakota

2. *Amendments and Innovations under "Security" Laws.*

(a) *Extraterritorial Reciprocity.* All of the new "security" type laws which are cited above were enacted with the extraterritorial reciprocity provisions patterned after the 1950 changes to the "model bill," except that of South Carolina which did not include reciprocity in its new law. New York amended its law by adopting these reciprocity provisions in Chap. 503, 1952 New York Laws.

(b) *Increase of Security Limits.* There has been no legislation increasing the security limits since the last report of the Financial Responsibility Laws Committee. However, New York increased the limits of compulsory insurance for minors to 10/20, and further required that minors must insure for property damage liability up to $5000. Chap. 244, 1952 New York Laws.

(c) *"Tempering" the Security Requirement.* Michigan has enacted a law permitting restoration of a suspended license upon a showing that the owner needs the vehicle in order to engage in gainful work or occupation. Public Act 270, Michigan Regular Session 1951. In Hawaii and Pennsylvania, those bills failed which proposed to make the security requirement applicable only after the motorist had been adjudged to be at fault as to the accident.

Michigan has also followed the lead of Maryland by allowing the running of the statute of limitations to amount to satisfaction. Public Act No. 17, Michigan Regular Session 1952. See Paragraph A. 3 of

the last report of the Financial Responsibility Laws Committee.

Arizona has exempted from the security requirements a driver who was driving a motor vehicle owned, operated or leased by his employer. In such a case, the employer must meet the security requirements, and the driver-employee is excused.

3. *Amendments to Financial Responsibility Laws.*

There have been no amendments to financial responsibility laws, as opposed to amendments to "security" type laws, except in those states noted above which have adopted "security" type laws in place of previously existing laws of the older type.

4. *Unsatisfied Judgment Funds.*

Legislation to establish unsatisfied judgment funds failed in Michigan, but was enacted in New Jersey. Chap. 174, New Jersey Laws 1952.

The New Jersey Fund Law

Probably the most significant development in the field during the past year was the enactment of a special type of unsatisfied judgment fund law in New Jersey. The law is somewhat unique by comparison with the Canadian and North Dakota laws of this kind in the manner in which the local insurers largely create the fund and participate in the claims work in which they have a real stake. This is designed to restrain abuses of the fund (default judgments, excessive amounts) and to confine its application to the most legitimate cases (which eventually should almost wholly be of stolen cars, hit-and-run drivers, and certain non-residents). The law is not available to uninsured motorists or their passengers, a further safeguard and incentive toward increasing the amount of insurance voluntarily in force. The effective date of the New Jersey fund was postponed until 1955 in order to give two years of operation to the security features of the Financial Responsibility Law which were only enacted at the same 1952 Session. By 1955 it is hoped and expected that the percentage of insured motorists of New Jersey will be far higher than the case today, even though not quite approaching the average New York level of 94 per cent.

Briefly, the law provides for the establishment of a fund for the payment of un-

List of Pertinent Legislation as of May 20, 1952

State	*Citation*	*Subject*
Alabama	Act No. 704, 1951	"Security" type law
Arizona	Chap. 68, 1952	Employee exemption from security
Massachusetts	Chap. 266, 1952	Application of compulsory insurance to non-residents doing business in the State
	Chap. 77, 1952	Technical change concerning suspension of uninsured non-residents
Michigan	Public Act 270, 1951	Exception to security provision
Mississippi	Senate Bill 7, 1952	"Security" type law
New Jersey	Chap. 173, 1952	"Security" type law
	Chap. 175, 1952	Motor Vehicle Liability Security Fund
	Chap. 174, 1952	Unsatisfied Claim and Judgment Fund
New York	Chap. 244, 1952	Increase of limits for compulsory insurance of minors
	Chap. 503, 1952	Adopts reciprocity provisions
Rhode Island	Senate Bill 58, as amended, 1952	"Security" type law
South Carolina	Chap. 752, 1952	"Security" type law
Texas	Art. 670 1h, 1952 Supplement to Vernon's Texas Statutes	"Security" type law
Virginia	Chap. 544, 1952	Technical change to its "Security" type law

collectible claims and judgments for personal injuries or property damages arising out of the ownership, maintenance or use of motor vehicles. To create the fund, every person registering an uninsured motor vehicle is required to pay an additional fee of $3.00. Every other person registering a motor vehicle is required to pay $1.00. Each insurer writing automobile liability insurance is required to pay one-half of 1 per cent of its net direct premiums. Thereafter, the fund will be maintained according to a formula set forth in the law. The fund is administered by a Board consisting of a State Treasurer and four representatives of insurers. A person who suffers injury or damages which may be satisfied from the fund, is required to give notice to the Board. The Board is required to assign to insurers for investigation and defense, the default actions, hit-and-run cases and other claims it deems advisable for the purpose of making an investigation or conducting the defense. A person who recovers a judgment in excess of $200.00 may apply for payment out of the fund. The limits are $5000/10,000 and $1,000. The conditions with which an applicant must comply are set forth in the Act. When the license of any person has been suspended or canceled and the treasurer has paid from the fund any amount in settlement of a claim or in satisfaction of a judgment against such person, the suspension shall not be removed until such person has repaid in full to the treasurer, the amount paid, with interest. The provision is also made for restoration of licenses.

The Continuing Problems

The ideal, which is unattainable wholly, is the elimination of motor vehicle collisions. The goal toward which we must strive is the elimination of all those which are not technically and properly "accidents." Most of the collisions which are the source of damage and resultant litigation are not accidents, but are due to improper or unsafe conduct on the part of someone.

Compensation for injuries and damage is remedial. Not only the insurance industry, but all others, must continue their efforts toward the prevention of automobile collisions and the improvement of highway safety. The basic problem is one of safety. The safety program might well include the following:

(a) *Driver Education.* Driver education should be made a regular part of the curriculum of all public, private and parochial high schools.

(b) *Enforcement of Speed and Other Traffic Laws.* It is clear that speed is the chief cause of serious collisions. Adequate enforcement should reduce the number.

(c) *Driver Licensing and Re-examination.* The granting of licenses to drive an automobile without regard to qualification should be eliminated. Licenses should be refused to physically and mentally handicapped people and the licenses of habitual offenders should be revoked.

(d) *Accident Records.* Accident reports, especially police reports, should be examined by some competent authority to determine accident causes and to institute prompt corrective measures.

(e) *Periodic Motor Vehicle Inspection.* The program should be adopted providing for periodic inspection of motor vehicles.

(f) *Traffic Engineering.* Street and road conditions which have been shown to be conducive to accidents should be eliminated.

Conclusion

Past experience indicates that the "security" type of financial responsibility legislation is to be preferred over compulsory insurance. Under such legislation, there is an economic and practical incentive to an owner, in addition to the other inducements, to procure insurance to protect his driving privileges.

The idea of compulsion is contrary to our basic American philosophy. However, the agitation for compulsory insurance still persists and one injured person who fails to recover for his injuries speaks more loudly and eloquently than a score who have recovered. Thus, the challenge remains to the industry to continue its efforts to solve the problem. Private enterprise can do it, if it will. Remarkable progress has been made. Our efforts must continue.

Respectfully submitted,
J. H. Gongwer, *Chairman*
Frank O'Kelley, *Vice-Chairman*
Palmer Benson
Fletcher B. Coleman
John A. Henry
John R. Kitch
Daniel Mungall
Warren Nigh
Forrest S. Smith
Milton L. Baier, *Ex-officio*

Report of the Fire and Inland Marine Committee

YOUR Fire and Inland Marine Committee respectfully submits the following report:

The principal work of your committee during the past year has been to carry forward the project started last year of cooperating, on behalf of insurance counsel, with the industry's Joint Fire and Marine Insurance Committee on Radiation. The proper place of insurance counsel upon such a committee is, of course, to provide legal advice as requested and to assist with suggestions as to the redrafting of insurance contracts to meet the changed conditions brought about by the use of atomic power. Mr. Ambrose B. Kelly, vice-chairman of your committee this year, has served upon, and attended the meetings of, the Joint Fire and Marine Insurance Committee on Radiation, and has kept the other members of your committee advised on the subject. It is recommended that the Association direct its next year's Fire and Inland Marine Committee to continue to work with the industry's Joint Committee.

Some work has been done by various members of your committee toward collecting and collating recent outstanding decisions in the field of fire insurance, but this work has not been completed, and the committee is not ready to report on it.

Your committee also offered to provide a speaker or a part of the program of this year's open forum at the annual convention, but the Open Forum Committee very properly thought that precedence this year should be given to consideration of the recent trend toward high verdicts in damage suits. It is hoped that perhaps next year a part of the convention program may be given to some subject within the scope of fire or inland marine insurance.

Respectfully submitted,
NEWTON GRESHAM, *Chairman*
AMBROSE B. KELLY, *Vice-Chairman*
V. M. ARMSTRONG
PINKNEY GRISSOM
J. LANCE LAZONBY
THEODORE G. MCKESSON
J. NEWTON NASH
SHELDON REYNOLDS
PAUL C. SPRINKLE
MELVIN H. ZURETT
PAUL F. AHLERS, *Ex-officio*

Report of the Life Insurance Committee

THIS year the committee has continued the study of legislation and decisions affecting the business of life insurance and has selected the material considered most important and interesting for this report.

In the field of legislation the Revenue Act of 1951 was probably the most important federal legislation affecting life insurance. Congress adopted, for the tax years beginning in 1951, a formula for a tax on the investment income of life insurance companies, without deduction for interest required to maintain policy reserves. This formula will result in a tax of 3¾% on the first $200,000.00 of investment income less certain deduction, and 6½% on such income in excess of $200,000.00. The Revenue Act also added to the Internal Revenue Code a defintion of "employee" to provide that a full time life insurance salesman who is considered an employee under the Social Security Act shall be considered an employee for the purpose of applying the provisions of the Internal Revenue Code which determine the effect of contributions for the benefit of, and distribution to, employees under stock bonus, pension, profit sharing and annuity plans. This provision was made retroactive to tax years beginning after December 31, 1938.

Also of interest was the enactment in 1951 of legislation to terminate the granting of new national service life insurance or United States Government insurance to persons in the armed forces (U. S. C. A. Title 38, Ch. 13, Sec. 818a) and to provide for automatic insurance without cost to persons in the armed forces (U. S. C. A. Title 38, Ch. 14, Sec. 825).

Since the date of the 1951 report of the committee there has been no important state legislation which has been brought to the attention of the committee.

In the field of litigation the case which

has aroused the most interest involves the question of a beneficiary's rights. It is the New York case of *Hall v. Mutual Life Insurance Company of New York,* (not yet reported). The insured's daughter was the beneficiary at the time of his death on June 15, 1941. The proceeds were payable in a lump sum. The policy contained a provision giving the beneficiary the option of selecting one of several "modes of settlement." She elected to take a "supplementary contract" by the terms of which the company was to retain the proceeds during her lifetime, pay her interest in quarterly installments, and upon her death, pay the principal to her husband, Albert Hall, if living, otherwise to her executor or administrator. Mrs. Hall had the right to withdraw all or part of the proceeds but not to change the contingent payee (Mr. Hall). Mrs. Hall secured a divorce, then died without having withdrawn the principal. Mr. Hall and Mrs. Hall's executor both claimed the fund.

The trial court held that the supplementary contract was an attempted testamentary disposition of the property and invalid and void. The court said that the policy, as a contract of insurance, terminated with the death of the insured and that all that remained was the obligation of the company to pay the proceeds of the policy. The court further said that the "supplementary contract" was a new contract pertaining to the proceeds and not to any insurance, that it related solely to an investment by the payee of the terminated policy, akin to a deposit in a savings bank.

The court took the position that the husband had no present interest in the fund, that his rights arose only upon his former wife's death and therefore the provision of the supplementary contract that he should take at her death could only have been valid if executed with the formality required for a will.

The decision has been appealed, with The Life Insurance Association of America and the State Association of Life Underwriters given leave to file briefs *amicus curiae.*

Some states have statutes which make the rule of the *Hall* case inapplicable and the New York legislature enacted legislation reversing the rule with respect to deaths occurring subsequent to April 18, 1952. However, the question raised in the *Hall* case is very important to insurance companies generally.

The Federal Circuit Court of Appeals for the Second Circuit in a case very similar to the *Hall* case (*Mutual Benefit Life Insurance Company v. Ellis,* 125 F. (2nd) 127-1942) held that the election of the beneficiary did not constitute "a supplementary contract" and was not a testamentary disposition. In this case the court held that the contingent payees had a vested right based upon a contractual obligation and not on any interest in the property of the insured, and that they were entitled to recover the proceeds of the policy as "third party donee-beneficiaries." The Supreme Court of the State of Washington has very recently decided a similar case (*Toulouse Jr., Executor v. New York Life Insurance Company,* 235 P. (2nd) 1003).

In this case the company issued a 20-year endowment contract to Robert Sherlock, the proceeds of which were payable to Sherlock, if living at the time the policy matured, otherwise to five named beneficiaries. When the policy matured Sherlock requested the company to retain $6000.00 of the proceeds, under option 1 of the policy, which provided for payments of interest to the insured and permitted the insured to withdraw all or part of the retained proceeds. A supplementary contract was issued which remained in Sherlock's possession, and which provided that the unpaid balance, if any, at the death of Sherlock should be paid to five nieces and nephews, if living, otherwise to Sherlock's executors. No withdrawals were made by Sherlock during his lifetime. After his death his executor sued to recover the balance due on the contract.

The court held that the supplementary contract gave the nieces and nephews a vested interest in the "performance of the contract" and that the supplementary contract was not a testamentary disposition subject to the statute of wills, but was a "valid third-party donee-beneficiary contract." There were two dissenting opinions.

In a four to three decision the Supreme Court of Ohio has held that a change of beneficiary by last will and testament of the insured is ineffective unless a change in such manner is expressly or impliedly authorized by the terms of the policy. The question arose in the case of *Stone v. Stephens,* 155 Ohio State 595. The in-

sured had named his wife as beneficiary in two policies in which he retained the right to change the beneficiary. The wife subsequently secured a divorce in an action in which the insured entered his appearance. The insured made no attempt to change the beneficiary in the manner provided by the policies but later made a will by which he bequeathed the policies to his grandmother. After the insured's death the former wife sought a declaratory judgment and the company interpleaded.

The court, in reaching its decision said:

"In accord with this well established rule, at the time of the death of the insured, his wife, Jeannette Marie Garver, became the possessor of a vested right to the proceeds of the policies. The will executed by the insured (the record not showing notice thereof to the companies) had no effect whatever until his death. From the conceded fact the insured had the right to change the beneficiary of his life insurance from time to time, it necessarily follows that this was a personal right to be exercised by him during his lifetime. A change of beneficiary during the lifetime of the insured cannot be made by will for the very simple reason that the will is without legal effect prior to the death of the testator."

The dissent was based upon the ground that the will, executed before the insured's death, expressed the plain intention of the insured and that by interpleading the companies waived the provisions of the policy respecting the manner of changing beneficiaries.

In another Ohio case, *Carson v. Metropolitan Life Insurance Company,* 156 O. S. 104, the Supreme Court reversed a judgment in favor of the company on an issue of suicide because, in the trial court, coroner's records and death certificate were admitted in evidence. Statutes provide that the records of the coroner and certificates of death shall be received in evidence as to the facts contained therein. The court held that the statements contained in the coroner's records and in the death certificate that the decedent committed suicide were mere opinion and not admissible in evidence. The court said that the words, "the facts therein contained" meant facts ascertainable from the evidence, and that, in the absence of direct testimony as to suicide, an expression by the coroner or a physician that the decedent committed suicide does not contsitute a fact as contemplated by the statutes.

In a Missouri case involving a similar question (*Jones v. Atlanta Life Insurance Co.,* 15 L. C. 299) the trial court had admitted that part of the coroner's report which contained the coroner's opinion as to the cause of death and refused to admit that part of the report containing the findings of fact. The Court of Appeals held that the entire report was admissible.

A case involving the incontestable clause of a policy is the California case of *New York Life Insurance Co. v. Hollender,* 15 Life Cases 141. The question presented was whether the incontestable clause of the policy prevented the insurer from adjusting the amount payable under the contract in accordance with the provisions of the age adjustment clause. The policy contained a two-year incontestable clause and provided that "if the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

In his application for the insurance, which was issued in 1931, the insured stated that he was born on April 27, 1886, and that his age was 45. The policy was in the face amount of $5,000 and provided for disability payments of $50 per month in the event of permanent and total disability before the anniversary of the policy on which his age at nearest birthday was 60.

The insured became disabled on December 16, 1945 and filed proof of claim for disability payments. In its investigation the insurer developed substantial evidence that the insured was born on April 27, 1884 and that he was 61 years of age at the time disability began. It filed an action for reformation of the policy in which the trial court ruled that the incontestable clause barred the insurer from disputing the insured's statement as to his age.

The Supreme Court reversed the judgment for the insured, holding that the intent of the incontestable clause was to fix a time limit within which the insurer must discover and assert any grounds it may have to justify a rescission of the contract, and that the insured's understatement of his age was not a ground for rescission but only a ground for enforcing the contract according to its terms. The court re-

viewed the leading cases in the country involving the same and similar questions.

In the case of *Woodward v. United States, et al,* 341 U. S. 112, the Supreme Court held that a brother by adoption is a permissible beneficiary under the National Service Life Insurance Act.

In a Texas case, *Armstrong v. Group Hospital Service, Inc.,* 14 C. C. H. Life Cases 1122, the Texas Court of Appeals upheld the right of the company to limit its benefits to payment for confinement in certain hospitals. In this case the policy provided for hospitalization benefits for confinement in certain hospitals defined as "Member Hospitals" and "Non-member Hospitals," and provided that a non-member hospital must be registered with the American Medical Association. Plaintiff's wife became ill and was taken to an unregistered hospital, where she was treated by a physician licensed to practice medicine. A statute controlling group hospitalization companies provided that such corporations shall not control or attempt to control the relations existing between the policyholder and his physician, but shall confine its activities to rendering hospital service without restricting the right of the patient to obtain the services of any licensed physician. The company denied liability. Plaintiff brought suit and prevailed in the trial court. On appeal plaintiff contended that by the provision in its policy limiting and defining hospitals covered by it, the company attempted to control the relations existing between a member and his physician, thereby restricting the right to obtain the services of licensed physician. The Court of Appeals reversed the trial court and held that the statute permitted the corporation to limit the amount of hospital service by its contract.

The Supreme Court of Missouri, in the case of *Butterworth v. Mississippi Valley Trust Company, et al.,* 14 C. C. H. Life Cases 1060, held that a gratuitous sub-assignee has an insurable interest in a life insurance policy. In 1935 a debtor made an absolute assignment of a policy to his creditor. The creditor paid the premiums until 1941 when he assigned his interest in the policy to trustees, without consideration, as a part of an estate plan for himself. In 1944 the insured made another assignment to plaintiff, who, in 1947, after the death of the insured, brought an action to recover the proceeds of the policy. The Court, in its opinion, said:

"The third contention the court considered at length. 'It has been broadly stated and sometimes without qualification, that it is a general rule of substantive law that "an assignment of a life insurance policy to one who has no insurable interest in the life insured is void." But research into that doctrine and the reasons sometimes advanced for it demonstrates that such broad and unqualified statement of legal principle is both inaccurate and misleading. . . .

"The principle of the good faith of the assignment transaction runs like a scarlet thread through the better reasoned cases. The decided trend of adjudications unquestionably is to establish the rule that an insurable interest in the insured by the assignee of a policy of life insurance is not essential to the validity of the assignment if the party to whom it was issued in good faith had an insurable interest, and if the assignment was in good faith and not made to cover up a gambling transaction. We unequivocally approve that rule. . . .

"Without the power of assignment life insurance contracts would lose much of their value. In a commercial age and with a commercial people, and in recognition of commercial practices, the courts are not unaware of the frequent necessity for the transfer by assignment of such contracts otherwise valid to those having an insurable interest, and to thus ignore the bona fides of assignments of convenience or necessity, would not only impair the value of such contracts as a plan of estate building and economic protection but would work unconscionable injury to policyholders who are no longer financially able to or who no longer desire to continue such contracts.' "

The decision in *Neff v. Massachusetts Mutual Life Insurance Co.,* 15 Life Cases 15 should be compared with the decision in *Beck v. West Coast Life Insurance Co.,* 15 Life Cases 291. In each case the beneficiary designation was in substance as follows: "To A, if living, otherwise to B." In each case the primary beneficiary (A) murdered the insured and was held to be disqualified from taking. In the *Neff* case it was held that the personal representative of the insured was entitled to the proceeds while in the *Beck* case it was held

that the contingent beneficiary was entitled to the proceeds of the policy. Thus the two cases reach opposite results on practically identical facts. In connection with the discussion of these two cases attention also should be called to the decisions of the Federal Courts in *Downey v. Beck*, which is a companion case to *Beck v. West Coast Life Insurance Co.* The Circuit Court of Appeals for the 9th Circuit, 14 Life Cases 1141, held that the estate of the insured was entitled to the proceeds. The Supreme Court of the United States reversed, 15 Life Cases 294, in view of the pronouncement of the California Supreme Court in *Beck v. West Coast Life Insurance Co.*

In the case of *Jordan v. Western States Life Insurance Co.*, 15 Life Cases 104, the insured had a policy which excluded death by aviation. The incontestable clause of the policy provided that the policy would be incontestable after two years from date of issue, except that part relating to the aviation hazard. The insured died as a result of operating or riding in an aircraft, an excluded risk, after the incontestable period had expired. The North Dakota Supreme Court held that the incontestable clause required by its statutes prevented a defense of death caused by an excluded risk and permitted the beneficiary to recover. The court in effect held that the incontestable clause in the policy was contradictory to the statutory incontestable clause and that the incontestable clause in the policy must give way. On application for rehearing the opinion was withdrawn but the court has now overruled the application.

A group insurance decision which is of interest is the case of *Board of Insurance Commissioners of Texas v. Great Southern Life Insurance Company*, 14 Life Cases 917. In this case Texas had a statute which required in substance that at least 25 employees of an employer be insured before a group policy could be issued. The Great Southern Life Insurance Company issued a group policy to the Texas Bankers Association whereby the employees of various banks belonging to the Association were insured. Some of the banks participating in the plan had less than 25 employees. It was held that the Texas statute requiring 25 employees of an employer to be insured prevented the issuance of a group policy and that the Texas statute was unconstitutional.

Respectfully submitted,
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GERALD M. SWANSTROM, *Vice-Chairman*
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JULIUS C. SMITH
SYLVESTER C. SMITH, JR.
ROYCE G. ROWE, *Ex-officio*

Report of Malpractice Committee

YOUR Committee on the Law of Malpractice herewith submits its Report.

For convenience, the Report refers to decisions in the various jurisdictions covered by the Reporter System. It was felt that this arrangement would be convenient and serve the purposes of counsel in general and with reference to their own jurisdiction, and would encourage the supplying of information in the nature of such addenda as might be indicated by members in the various jurisdictions. Accordingly the Committee invites comment from the members of the organization with respect to their own jurisdiction, and would particularly appreciate corrections or additions where they are indicated, and, where possible, interesting decisions in trial courts that would be of significance to the members of this Association. This material, of course, is not available usually unless the case has been appealed, so that information of general interest in the field of malpractice would be welcomed by our organization for the benefit of the succeeding committee in this particular field.

FEDERAL REPORTER SYSTEM

(Contributed by Richard N. Hunter of the firm of Lowry & Hunter, Waukesha, Wisconsin)

There are no cases relating to malpractice actions against hospitals nor against attorneys.

The case of *Ayers v. Parry* (3rd CCA August 28, 1951) 192 F. 2nd 181, involved a malpractice action against a surgeon and his anesthetist. The trial court had entered judgment for the defendants at the conclusion of the plaintiff's testimony upon the theory that the plaintiff had failed to make out a *prima facie* case. Such judgment was affirmed upon appeal. The plaintiff testified that he had been operated on by the defendants to remove an obstruction from the common bile duct and that a spinal anesthesia was used. When the anesthetic needle was introduced into the spine, the plaintiff suffered severe pain radiating down into his right leg and causing him to faint almost immediately. On the following morning he had a partial paralysis of the right leg and atrophy and sensory changes occurred in the right leg, persisting until the time of trial. The plaintiff used two experts, an anesthetist and a neurologist, in an attempt to bolster his case. The anesthetist testified that the pain was probably caused by the needle striking the nerve roots, but he did not express an opinion as to whether or not the operation should have continued under the circumstances.

The plaintiff's neurologist testified that the pain from the puncture needle was a common experience and that the anesthetic agency had a toxic effect on the nerve roots, thus producing patient's physical disability. It was also testified that such a reaction to the anesthetic solution was an unusual one.

Upon this state of the record the court held that there had been no sufficient showing that the anesthetist had violated any duty toward the plaintiff.

The court applied the New Jersey rule that the physician undertakes that he is possessed of that degree of knowledge and skill which usually pertains to other members of his profession and it is his duty to use that degree of knowledge and skill. It is interesting to note that under this rule the task is not limited by the degree of knowledge and skill exercised in the locality where the operation was performed.

The court likewise points out that the usual rule is that lack of care or diligence must be established by expert testimony, except in cases where an injury results to a part of the anatomy not being worked on and is of such character as to warrant the inference of a want of care from testimony of laymen, or based upon the knowledge and experience of the jurors.

The court points out that in this case the injury to nerve roots was certainly not within the realm of laymen's knowledge or experience and could only be explained by experts.

The plaintiff's own experts had ascribed the cause of the injury to the toxic quality of the injected drug and not the negligence of the anesthetist. The court likewise refused to apply the *res ipsa loquitur* rule, saying that in this case the injury was one that might have occurred even though proper care and skill were used.

It is interesting to note that the court specifically refused to discuss the question of the liability of the surgeon for any negligence on the part of the anesthetist.

Apparently the only significant factor in the cited case is the broadening of the definition of the standard of care required of physicians and surgeons to eliminate the restrictions of the care exercised in the same locality.

This broadening is apparently in line with the decisions of the Supreme Court of California, cited in the last report of the Malpractice Committee.

Addenda

Smedra v. Stanek (Colo.) 187 Fed. (2d) 892.

Googe v. U. S., 101 Fed. Supp. 830.

ATLANTIC REPORTER

(Contributed by William H. Bennethum of the firm of Morford, Bennethum, Marvel & Cooch, Delaware Trust Building, Wilmington Del.)

A. *Legal.*

1. An attorney acting as a mere stenographer or clerk in filling in blanks in a deed form does not assume liability as a conveyancer.

Chalupiak v. Stahlman, 81 A. 2d 577 (Pa.)

2. Relation between client and attorney is one of extreme trust and confidence. Compare, No. 3 and No. 6 below).

Washington Trust Co. v. Bishop, 80 A. 2d 185 (R. I.)

3. Care required of attorney in looking after client's affairs appears to be the ordinary, prudent man rule.

Williams v. Knox, 76 A. 2d 812 (N. J.)

4. Where attorney advised against settlement of a wrongful death claim and subsequently lost suit, no cause of action lies against attorney where administrator had failed to give attorney true facts on which action was predicated.

Niosi v. Aiello, 69 A. 2d 57 (Dist. of Col.)

5. In making title search, attorney is not liable for failure to report lien which would have been revealed had he brought search down to date where his employment is restricted to search of title.

Watson v. Calvert Building & Loan Ass'n., 45 Atl. 879 (Md.)

NOTE: This is a 1900 case, digested for the first time under this heading in the 1951 pocket part of the Del. and Atl. Digest. There are numerous other cases reported herewith which have appeared for the first time in the pocket part.

6. It ought to be immediately acknowledged that it is the duty of an attorney who is retained to examine title to real estate to make a reasonably diligent and zealous investigation of the public records and to impart to his client all of the observable defects, deficiencies and imperfections of the title. In performing this professional duty, he must exercise ordinary care, knowledge and skill.

The attorney, in searching the title, is under no duty to personally discover the terrestrial characteristics of the situs involved by use of theodolitic transit or otherwise; nor is he ordinarily a guarantor for the accuracy of the work of a civil engineer in making a survey, although he may have recommended the particular surveyor for the work.

Toth v. Vazquez, 65 A. 2d 778 (N. J.)

7. Threat of law suit to collect fee, in and of itself, does not constitute duress in obtaining note from client for balance of fee; but where attorney was former Chairman of Board of Immigration Appeals and services to client were for services before that Board and attorney told client and wrote to him "You force me to sue you in court. That I am going to do. As soon as I do, your deportation will follow—of this I am certain," matter goes to jury on question of duress and undue influence. However, Judge Claggett, in what appears to be a very able dissent, feels that the attorney's actions constituted duress and undue influence as a matter of law.

Rizzi v. Fanelli, 63 A. 2d 872 (Dist. of Col.)
Also see: *Hankin v. Spilker,* 81 A. 2d 86 (Dist. of Col.)

8. Attorney liable for maintenance expenses in Cuba of prospective immigrant while latter awaits outcome of attorney's futile and negligent failure to obtain admission to this country.

Tsibikas v. Morrof, 79 A. 2d 64 (N. J.)

B. *Hospital.*

1. Action against hospital, a charitable institution, for causing new born baby to be burned by placing hot water bottles in bassinet may sound either in tort or contract; whether patient is a charity or paying case makes no difference and the doctrine of *respondeat superior* applies in such cases.

Durney v. St. Francis Hospital, 83 A. 2d 753 (Del.)

2. Action based upon corporate negligence as distinguished from negligence of employee where paying patient received burns while taking heat lamp treatment cannot be predicated upon fact that hospital was understaffed; under tort, doctrine of *res ipsa loquitur* held not applicable.

Richards v. Grace-New Haven Community Hospital, 79 A. 2d 353 (Conn.)

C. *Physicians*

1. One not licensed under Healing Arts Practice Act, nor acting under direction of a licensee and who, for a price, agrees to treat patient for arthritic condition by rubbing in ointment and massage is guilty of illegal practice of the Healing Arts.

Rubin v. Douglas, 59 A. 2d 690 (Dist. of Col.)

2. A chiropractor is not a physician and engaging in such practice is not the practice of medicine.

Osborne v. Talbot, 78 A. 2d 205.
See also: *Thomas v. Carlton Hosiery Mills,* 81 A. 2d 365 (N. J.)

3. Statute forbidding optometrists from advertising would not prohibit optometrist from maintaining an office with a retail merchant selling optical supplies and from assisting such merchant in the conduct of his business, including the advertising of the retail business by alluding to the fact that a registered optometrist maintains a place of business at such address.

Berger v. Board of Examiners in Optometry, 59 A. 2d 717 (R. I.)
See also: *New Jersey State Board of Optometrists v. M. H. Harris, Inc.,* 81 A. 2d 387 (N. J.)

4. When forfeiture of medical license may be on statutory enumerated grounds, proceeding to revoke license must be limited to such grounds.

Adam v. Connecticut Medical Examining Board, 79 A. 2d 350 (Conn.)

5. License to practice dentistry may be suspended where licensee agrees to work at his profession for another who is unlicensed.

Taber v. State Board of Registration and Examination in Dentistry of New Jersey, 63 A. 2d 535 (N. J.). Appeal dismissed, 337 U. S. 922.

6. On general question of trial procedure and competency of evidence in a revocation of license case predicated on negligent conduct see:

Jaffe v. State Department of Health, 64 A. 2d 330 (Conn.)
Adam v. Connecticut Medical Examining Board, No. 4 above.

7. Laches is no defense in action by Board to revoke license illegally obtained by fraud in its procurement even though 34 years has elapsed since license was issued.

Pennsylvania State Board of Medical Education & Licensure v. Schireson, 61 A. 2d 343 (Penna.)

8. In malpractice case, osteopath held only to ordinary skill and care, not the highest skill possible.

Josselyn v. Dearborn, 62 A. 2d 174 (Me.)

9. Physicians are not responsible for results or errors in judgment but only for negligent acts in causing the result.

Green v. Stone, 176 Atl. 123 (Conn.)
See also: *Hodgson v. Bigelow,* 7 A. 2d 338.
Coleman v. McCarthy, 165 Atl. 900 (R. I.)
Domina v. Pratt, 13 A. 2d 198, 204 (Vt.)
Ward v. Garvin, 195 Atl. 885 (Penna.)
Willard v. Norcross, 85 Atl. 904 (Vt.)
Emery v. Fisher, 148 Atl. 677 (Me.)
Josselyn v. Dearborn, 62 A. 2d 174 (Me.)

And "ordinary care" rule as practiced by Christian Science Healers, not physicians, is applied in case involving such science.

Spead v. Tomlinson, 59 Atl. 376 (N. H.)
Bierstein v. Whitman, 62 A. 2d 843 (Penna.)

10. An infant receiving injuries, *en ventre sa mere,* as result of doctor's improper diagnosis and treatment of mother's pregnant condition, has a cause of action for such injuries after its birth viable as do the parents for the consequential damages.

Stemmer v. Kline, 17 A. 2d 58 (N. J.)

11. Where plaintiff suffered abscess after injection of a certain extract and doctor was made party defendant by *scire facias* proceeding, fact that extract was a contributing cause of injury together with dosage and likelihood of unsterile needle would not relieve doctor of responsibility if he had knowledge that plaintiff might suffer from injection.

Henderson v. National Drug Co., 23 A. 2d 743 (Penna.)

12. Statement to patient that operation would not be serious not actionable where it developed that operation was, in fact, serious but also necessary.

Bernath v. Le Fever, 189 Atl. 342 (Penna.)

13. Staff surgeon who assisted at operation not guilty of negligence in permitting post-operative care to pass to other licensed physicians where hospital system divorced post-operative care from the operation.

Sheridan v. Quarrier, 16 A. 2d 479 (Conn.)

14. Physicians employed solely to administer anesthetic to patient whose leg is being reset by other doctor is not responsible for the malpractice of the chief surgeon even though he observed technique used and thought it improper and remained mute.

Lawson v. Crane & Hall, 74 Atl. 641 (Vt.)

15. Although surgeon is guilty of assault for performing unauthorized operation upon adult same person, such is not the case if the act complained of was an extension of the original operation and classed as an emergency, the question of whether or not an emergency existed being for the triers of the facts.

Barnett v. Bachrach, 34 A. 2d 626 (Dist. of Col.)

16. There is no *prima facie* liability because a patient is burned in the use of x-ray treatment.

Kelly v. Yount, 12 A. 2d 579 (Penna.)

17. Where patient's finger was infected to point it was necessary to remove it at time consulting osteopath first saw patient, he is neither jointly nor severally liable with osteopath who treated finger in first instance, even though the consulting osteopath did not consult with the referring osteopath.

Josselyn v. Dearborn, 62 A. 2d 174 (Me.)

18. In malpractice case it is the usual rule that expert testimony is needed to support plaintiff's case.

Nolan v. Kechijian, 64 A. 2d 866.

Addendum

Ambrosi v. Monks (District of Columbia Mun. App.) 85 Atl. (2d) 188.

NEW YORK SUPPLEMENT REPORTER

(Contributed by William F. Martin of the firm of Martin & Clearwater, 30 Broad Street New York)

A brief summary of the malpractice cases covered by the New York Supplement Reporter system since April of 1951, follows:

As to hospitals.

Application of Bryant, 105 N. Y. Supp. 2nd, 446. Motion by the mother of an alleged incompetent to inspect hospital records relating to the incompetent, was denied since such relief may be afforded only to a legal representative of the patient entitled to waive the statutory ban of patient and physician privilege under Civil Practice Act, Sections 352, 354.

Parker v. State of New York, 105 N. Y. Supp. 2nd 735. A patient in a hospital (not a State Hospital) contracted homologous serum jaundice and died following a transfusion of pooled blood plasma distributed to the hospital by the State Commissioner of Health through the agency of the Red Cross. The Court of Claims held that the State, acting as distributor of the pooled blood plasma, was not liable to the estate of this patient who contracted homologous serum jaundice, an inherent danger known to the medical profession following the transfusion of blood plasma ordered by a physician at the hospital, in the exercise of his medical knowledge. The Court held that there was no negligence on the part of the State simply because it had not affixed a warning label on blood plasma cartons instructing licensed physicians in the application of the plasma where such plasma was in common use and the danger of homologous serum jaundice was well known among physicians, even where there has been no negligence in its preparation and use. The patient may not complain simply because a preparation which has cured others, failed to cure him or caused him unavoidable harm.

Corten v. Harbor Hospital, Inc., 108 N. Y. Supp. 2nd, 352. This was an action to recover for personal injuries alleged to have been caused by the hospital's negligence in removing a patient from its hospital to another hospital eight to ten miles distant. The removal was made within 24 hours after the patient had undergone an operation in which a six-inch incision had been made through the abdominal wall into the peritoneal cavity, which incision was then closed with skin clips. The Appellate Division, Second Department affirmed a judgment in favor of the plaintiff, there being evidence from which the jury could reasonably have found that the patient's removal was an administrative act on the part of the hospital done over the patient's protest and without the consent and against the advice of his surgeon, all for the hospital's own purposes and

benefit and not in the course of the patient's medical treatment, and where there was evidence that such removal was the competent producing cause of the claimed injury.

As to physicians.

No cases reported.

As to attorneys.

No cases reported.

Addendum

Roth v. Beth El Hospital, 110 N. Y. S. (2d) 583.

NORTHEASTERN REPORTER

(Contributed by William T. Campbell, of the firm of Swartz, Campbell & Henry, Lincoln-Liberty Building, Philadelphia 7, Pa.)

McGuinn v. Knickerbocker Hospital, 97 N. E. 2d 760.

This case was decided by the Court of Appeals of New York March 1, 1951 in a memorandum decision. The case was summarized by the Court itself as follows:

"It was undisputed that hot water bottles covered by towels were applied to the first named plaintiff by an experienced registered nurse while the plaintiff was in the operating room and at a time when she was in a state of operative shock. The burns were seen while plaintiff was on a stretcher and was being returned from the operating room to her bed.

The Trial Term, Supp. 89 N. Y. S., 2d 32, directed a verdict for the defendant dismissing the complaint on the merits on the grounds that even if the use of hot water bottles by the nurse was not directed by the operating physician and if their use may have constituted negligence, defendant was not liable for the act of the nurse."

Judgment was affirmed without any written opinion.

Bakal v. University Heights Sanitarium, Inc., 100 N. E. 2d 51.

This is also a decision of the Court of Appeals of New York. Plaintiff sued a private hospital, University Heights Sanitarium, Inc. and Dr. Max Eisenstat. The facts are summarized in the opinion as follows:

"Plaintiff was a paying patient and was severely burned by an electric plate which was connected with and operated an electro cautery knife used by the doctor. The plate was usually applied by nurses as a routine matter before the doctor entered the operating room and was so applied by the hospital nurse. The doctors who were to operate relied on nursing personnel of the hospital to put the machine and plates in place before they started the operation.

The Trial Term, 198 Misc. 651, 99 N. Y. S. 2d 814, dismissed the complaint against the doctor on ground that there was no evidence of negligence on his part and was of the opinion that a private non-charitable hospital operated for profit was liable for the negligence of the nurse in improperly and negligently applying the electric plate to plaintiff's body. The Appellate Division, 277 App. Div. 572, 101 N. Y. S. 2d 385, affirmed the judgment dismissing the complaint against the doctor and reversed the judgment for the plaintiff against the hospital corporation and dismissed the complaint on the ground that a hospital, whether charitable or private, was immune from liability by reason of the negligence of a doctor or nurse with respect to matters relating to the patient's medical care and attention, and plaintiff appeals."

This judgment was also affirmed without opinion.

Addendum

Blackman v. Zeligs (Ohio), 103 N. E. (2d) 13.

NORTHWESTERN REPORTER

(Contributed by Kenneth P. Grubb of the firm of Quarles, Spence & Quarles, 828 North Broadway, Milwaukee, Wisconsin).

Bast v. Marsden, 260 Wis. 459, 50 N. W. 2d 686. The jury in this case had found the defendant casually negligent in failing to maintain a proper *lookout* for the radial nerve, which he damaged in operating on the plaintiff's arm.

The Supreme Court affirmed the judgment for the plaintiff, holding that the evidence sustained the verdict; in view of the fact that the defendant himself had testified that he knew the radial nerve was

in the area of the operation, that his vision was not obscured, and that the radial nerve was distinguishable from other tissue in the arm; and in view of the fact that another doctor had testified that the radial nerve was readily distinguishable from surrounding tissue and that a competent surgeon should be able to recognize it.

Bryant v. Biggs, 331 Mich. 64, 49 N. W. 2d 63. In an action against two osteopathic physicians and surgeons, the trial court had allowed into evidence, testimony by a physician and surgeon of a different school of medicine. This expert testified, from his experience in treating similar cases, that the standard practice of his school of medicine was not followed in the instant case. He also testified that he knew nothing about osteopathy, but stated that not following the standard he was familiar with could reduce a patient's chance for survival or cause death. At the close of the plaintiff's case the trial court struck out the testimony of this doctor and directed a verdict for the defendant.

On appeal, the court held that the trial court properly struck out this testimony and directed a verdict for the defendants because in mal-practice cases,

> " . . . the care, skill and diligence exercised by the defendant is to be judged by that standard of ordinary care which ordinarily is exercised by physicians and surgeons of the same school of medicine in the same general neighborhood, or in a similar locality."

In this case, that standard care meant the treatment customarily used in the community, or a similar community, by ordinary or average practitioners of osteopathy. The court went on to say that this general rule would not apply to exclude testimony of physicians of other schools when that testimony would bear on a point to which the principles of the two schools concur, but that the physician must first show that he is completely familiar with the accepted practice in the other school of medicine.

Pedler v. Emmerson, 331 Mich. 78, 49 N. W. 2d 70. In an action against an osteopath for mal-practice in treating a cut hand, an allopath was allowed to testify as to the standard of practice; and in answer to a hypothetical question stated that the treatment did not follow the standard practice and probably caused the poor result involved. The allopath testified he knew nothing about the practice of osteopathic physicians and surgeons.

A jury verdict for the plaintiff was set aside by the Supreme Court on the ground that the testimony of the allopath was improperly admitted since he was not in a position to testify as to the standard of practice for osteopaths.

Addenda

Since the preparation of the foregoing material, the Supreme Court of Minnesota has handed down a decision in the case of *Sylvester v. Northwestern Hospital of Minneapolis,* 53 N. W. (2d) 17, decided April 18, 1952, reported in the Advance Sheet section of May 21, 1952. The Supreme Court of Minnesota reversed the directed verdict of the trial court on the premise that where defendant hospital knew or in the exercise of reasonable care ought to have known that one of its patients was so intoxicated as to stagger when walking, it ought reasonably to have anticipated (although it had no actual knowledge that such patient was possessed of vicious or aggressive tendencies when drunk) that to permit him to wander about the hospital unguarded was likely to result in injury to other patients, and it is liable for any injury which proximately resulted from his intoxicated condition, although it could not have anticipated the particular injury which did happen.

Stickleman v. Synhorst, (Iowa), 52 N. W. (2d) 504.

PACIFIC REPORTER

(Contributed by Fred O. Reed of the firm of Reed and Kirtland, 621 South Spring Street, Los Angeles, California)

Simone v. Sabo, 37 C. 2d 253; 231 P. 2d 19:

Malpractice—Instructions — In a dental malpractice action, an instruction on the degree of learning and skill required of a general practitioner, confronted with a case coming within the field of specialists practicing in the same locality, is subject to criticism if it fails to state that there is a duty to refer a patient to a specialist only if, under the same circumstances, a reasonably careful and skillful general practitioner would have done so.

Standard of Care and Skill—A general practitioner's duty must be measured in relation to the facts in the particular case, and in determining his course he may and should consider such elements as the patient's mental and emotional condition, his known financial situation, and the many other variants which a physician meets in treating human ailments.

In a malpractice action against a general dental practitioner based upon alleged negligence in failing to refer the patient to an oral surgeon, an award of damages cannot be sustained in the absence of expert testimony that the treatment of the defendant was contrary to what a reasonably prudent and skillful oral surgeon would have done.

Statement of Facts—The defendant general practitioner of dentistry undertook to extract an impacted tooth. The patient claimed that he could see the dentist's procedure, that the dentist held a chisel against his tooth, that the assistant struck the chisel first with a small hammer, and later with a regular nail hammer, using both hands. That he was hit so hard that he passed out. The doctor admitted that the assistant used two hammers to assist in breaking the tooth, but insisted that they were surgical hammers. There was evidence that the procedure resulted in a bruising or severing of the mandibilar nerve resulting in permanent anesthesia of the lip and jaw.

The plaintiff presented expert testimony that it was customary for a general practitioner to refer similar extractions to an oral surgeon; that complications occur in approximately twenty-five per cent of extractions and that any dentist doing such an operation should inform the patient of the likelihood of the complications.

An oral surgeon testifying on behalf of the defendant stated that it was customary for general practitioners observing required standards to extract impacted teeth; that some referred their patients to specialists and others did their own extractions.

The court held that failure to refer to a specialist is not actionable in the absence of evidence that the treatment was not in accordance with the standard of skill employed by specialists, that there was no evidence that the failure to refer the patient to a specialist or to advise him of the hazard of the procedure were proximate causes of injury.

Nielsen v. Milligan, 100 C. A. 2d 40; 222 Pac. 2d 916, Oct. 1950.

FACTS: The plaintiff was being treated for obesity in the course of which he gave the patient hypodermic injections. Infection developed at the site of the injection. The patient returned and the evidence indicated that she did not receive adequate after care.

The complaint alleged that the defendant was negligent in using an unsterile needle and defective serum in the needle, as well as general allegations of negligence. The case was tried without a jury and the trial court specifically found that the defendant did not use an unsterile needle, or defective serum, but did find that the defendant was negligent in the after care of the plaintiff after the infection developed.

The Appellate Court held that where a complaint alleges negligence in general terms as well as specific acts of negligence, plaintiff is not limited to proof of the specific acts, and is entitled to recover for damages resulting from a failure to accord proper care in treatments not particularly specified.

Cavero v. Franklin, etc. Benevolent Soc., 36 2d 301; 223 Pac. 2d 471 (Oct. 1950).

This was an action against a hospital and the operating surgeons as a result of the death of a child during a tonsillectomy. A resuscitator which was not in the surgery but which was in an adjoining room and which was procured in four minutes was used unsuccessfully.

The death certificate established the cause of the death as the inspiration of hemorrhagic material. There was expert testimony by the defendant doctors of improper administration of anesthetic by a hospital nurse-anesthetist from which the jury could infer that such inspiration was the result of the method of administration.

There was no direct expert opinion testimony that the death was the result of the anesthetic or of the failure of the hospital to have a resuscitator immediately available.

The court gave an instruction on the doctrine of *res ipsa loquitur* as to all defendants. The jury returned a verdict against the hospital and the nurse-anesthetist and in favor of the operating surgeons. The Supreme Court in approving

the instruction, cited *Ybarra v. Spangard,* 25 Cal. 2d 456, and pointed out that in the case at Bar as in the cited case, there was expert testimony that the death was not the result of something systemic or pathological; that there was testimony of the operating surgeons that she had performed hundreds of such operations over a period of 40 years without a death and that therefore the inference arose that the death was something which did not occur in the absence of negligence.

The Supreme Court also cited *Moore v. Belt,* 34 Cal. 2d 525 wherein it was held that the doctrine did not apply in connection with a cystoscopy where the inference that the injury resulted from some source pre-existing in the plaintiff's system was not remote, but could be drawn from substantial evidence in the record, and pointed out that in the case at Bar the inferences that the injury flowed from the conduct of the defendants was not remote.

Bennett v. L. A. Tumor Institute, 102 C. A. 2d 293; 227 P. 2d 473 Feb. 1951.

STATEMENT OF FACT: The plaintiff received x-ray treatment to her foot for papillomae. The plaintiff described the condition of her foot following the treatments.

The plaintiff produced a chiropodist who had examined the plaintiff and treated her, and attempted to qualify him as an expert. The court declined to qualify the witness. The plaintiff produced no expert testimony as to the standard of care or the cause of the condition relying upon the doctrine of *res ipsa loquitur.* The trial court declined to apply the doctrine and granted a nonsuit.

The court held that a lay person could not determine whether the condition of the plaintiff's feet was the result of the administration of the x-rays or the development of the original condition of the plaintiff or of a new pathological condition, and that a lay person could not determine as matter of common knowledge whether the condition was such as would have followed had ordinarily due care been exercised.

The court further held that the question of qualification was addressed to the sound discretion of the trial court.

Champion v. Bennett, 37 A. C. 825—In Back Oct. 19, 1951.

The defendant physician in performing a varicocelectomy placed a rubber drainage tube in the scrotum, intending to remove it later. The tube slipped inside. The patient returned to his home. Later the patient discovered the presence of the tube and the doctor removed it claiming it had been left intentionally to maintain drainage. Subsequently it was necessary to remove a testicle. The jury returned a verdict in favor of the plaintiff which was set aside by the trial judge on a motion for judgment *non obstante veredicto.* After being affirmed by the District Court of Appeal (104 A. C. A. 364)—231 Pac. 2d 108, the case was reversed, the Supreme Court holding that there was evidence upon which the jury could have concluded that the tube was completely enclosed within the scrotum at the time of the operation and the incision tightly sutured, or that the defendant left the tube protruding and failed to fasten it so as to prevent withdrawal into the scrotum, and that either view of the evidence disclosed surgical procedure contrary to the requisite standard under expert testimony presented upon direct and cross examination of the defendants.

Romero v. Eustace, 101 C. A. 2d 253; 225 Pac. 2d 235 (Dec. 1950).

The above action was for damages alleged to have resulted from the negligent application to the body of the plaintiff of caustic chemicals in the irrigation of the bladder, and the use of a solution which in accordance with the standard of care in the community should not have been applied to living human tissue.

Defendant's experts specified that the condition of the bladder and the pain was the result of cystitis and not of a chemical burn.

Upon conflicting evidence the court found in favor of the defendant.

Huffman v. Lindquist, 37 A. C. 467, 234 P. 2d 34, June, 1951.

The foregoing is a rehearing after decision in the District Court of Appeal, 213 Pac. 2d 106. The patient was brought in with a skull injury, developed an epidural hemorrhage, went into a coma and died from a pulmonary embolism.

No expert testimony was produced other than that of the defendant called as an adverse witness by the plaintiff. There was

no expert testimony that there was a failure to exercise the requisite standard of care. The defendant relied upon R. I. L. and a nonsuit was granted and affirmed.

The case contains no new law. It reiterates the rule of the more recent cases of our Supreme Court emphasizing the necessity of expert testimony as to proximate cause, the application of the doctrine of *res ipsa loquitur*, the necessary proof in an action for malpractice where the doctrine is not applied, the presumption of due care as to the treatment by the physician in the absence of expert testimony, and the requirement of qualification of an expert medical witness.

Danielson v. Roche, 109 A. C. A. 915, 241 Pac. 2d 1028, Mar. 1952.

This was an action against a physician predicated upon an alleged assault in removing her Fallopian tubes during an operation for the removal of the appendix allegedly without her consent.

The defendant doctor testified to a condition of the plaintiff's tubes, discovered at surgery, which in his opinion necessitated their removal for the preservation of the patient's life and health. The court held that this constituted a surgical emergency eliminating the necessity of consent, there being no contrary expert testimony.

The defendant had obtained a consent signed by the plaintiff stating in substance that she consented to the administration and performance of all treatments and operations "which may now or during the contemplated services be deemed advisable or necessary." The court held that the jury was justified in finding upon the foregoing document that the plaintiff had specifically consented to the operation in question.

Duprey v. Shane, 108 A. C. A. 400, 238 P. 2d. 1071, Dec. 1951.

The doctor's employee was injured in the course of his employment and the doctor negligently treated him therefor.

Malpractice. When an employee subject to the Workmen's Compensation Act is injured in the course of his employment, and the physician treats negligently, causing a new and further injury, the injured employee may recover from the doctor in a civil action for malpractice.

While the law opposes the creation of dual legal personalities, it will recognize the fact that a physician subject to the W. C. A. who chooses to treat his own industrially injured employee bears toward the employee the relationship of physician as well as employer, and the employee may proceed against his employer before the I. A. C. and may also sue him in a civil action for malpractice.

Addenda

Bakewell v. Kahle (Mont.) 232 Pac. (2d) 127.

Derr v. Bonney (Wash.) 231 Pac. (2d) 637.

Tiller v. Von Pohle (Ariz.) 230 Pac. (2d) 213.

Dodson v. Pohle (Ariz.) 239 Pac. (2d) 591.

SOUTHEASTERN REPORTER

(Contributed by Wilson Anderson, of the firm of Steptoe & Johnson, Attorneys at Law, Kanawha Valley Bldg., Charleston, West Virginia)

A. *Malpractice Cases Against Lawyers. Fahey v. Brennan* (2 cases) W. Va. 1951, 68 S. E. 2d 1. These cases arise upon rules in prohibition awarded petitioners, who are brothers, against J. H. Brennan, Judge of the Circuit Court of Hancock County, to show cause why the Judge should not be prohibited from further proceeding in matters relating to the suspension or annulment of petitioners' licenses to practice law.

"1. Attorney and Client (Key 54).

If an attorney adduces known false testimony in trial before circuit court, the alleged malpractice is 'observed by the court' within statute and by-law of the State Bar providing that the Supreme Court of Appeals and other courts of record, except county court, observing any malpractice therein by an attorney, have jurisdiction to order that the attorney so offending be summoned to show cause why his license to practice law should not be suspended or annulled, and therefore circuit court has jurisdiction to hear charges against attorney, and jurisdiction is not vested exclusively in The Committee on Legal Ethics of the State Bar. Code 30-2-7."

"2. Prohibition (Key 10 (1)).

A writ of prohibition does not lie in absence of a clear showing that trial

court is without jurisdiction to hear and determine a proceeding, or, having, such jurisdiction, has exceeded its legitimate power."

(Syl. 1 and 2)

B. *Malpractice Cases Against Hospitals.*

(No reported cases against hospitals on the subject of malpractice).

C. *Malpractice Cases Against Doctors.*

Mayo v. McClung, Court of Appeals of Georgia 1951, 64 S. E. 2d 330. Plaintiff had sued defendant for alleged malpractice. The trial court directed a verdict for the defendant and plaintiff brought error. The Court of Appeals held that there was no evidence of malpractice or negligence on the part of the defendant and affirmed the judgment.

"1. As to a diagnosis by a doctor for discovering the nature of an ailment and for the treatment of the ailment, the general rule of law is that the patient is entitled to a thorough and careful examination and treatment such as the condition of the patient and the attending circumstances will permit. As to the diligence and method of the diagnosis for the discovery of the nature of the ailment and the treatment therefor, the doctors must bring into use such diligence and methods in the diagnosis to discover the nature of the ailment and the treatment therefor as are usually approved and practiced under similar circumstances by members of the profession in good standing. As to what is the proper method of diagnosing a case, and the treatment of the ailment, these are medical questions to be established by physicians as expert witnesses. No layman, juror or court will be permitted to say what is the proper method in diagnosing and treating a case. A layman may testify as to the results."

(Syl. 1 by the Court)

An interesting point of evidence appears in this case.

"5. Physicians and surgeons (Key 18 (7)).

In malpractice action for alleged negligent treatment of an impacted fracture of plaintiff's left leg, question propounded to physician, who appeared as witness for plaintiff, whether in his opinion he could expect to get as satisfactory results from a reconstructive operation as could be expected from prompt reduction of a fracture following occurrence of injury, had no bearing upon any issue and was immaterial."

(Syl. 5)

Fauver v. Bell, Virginia 1951, 65 S. E. 2d 575. The plaintiff in this case had been injured in an accident arising out of and in the course of his employment and had been awarded and had accepted benefits provided under the Workmen's Compensation Act. The Virginia Supreme Court held that such a plaintiff is not barred from maintaining an action against a physician or surgeon for malpractice in treating the injuries sustained by such a plaintiff.

In making its decision, the Court used this language:

"(18) The physician does not share the burdens of the Act imposed upon the employer and is entitled to none of its benefits. It would seem unreasonable to assume that the legislature in its enactment of the Workmen's Compensation Act intended to save a class of wrongdoers unrelated to the compensation scheme from the liability which the law had theretofore imposed upon them, or that independent professions by the fact of business contact with the employer should be relieved of responsibility for mistake or neglect resulting in secondary affliction. Such a holding would leave the injured employee without adequate relief, and would, we think, present a situation in contravention of the purposes of the Act."

(65 S. E. 2d 582)

Jackson et al v. Mountain Sanitarium & Asheville Agriculture School, et al, 234 N. C. 222, 67 S. E. 2d 57. The defendant physician (hospital and other defendants having been directed out of case) performed a tonsillectomy upon infant who died 20 hours later. Plaintiff charges negligence by doctor in administering anesthetic and in absenting himself for several hours after the operation. Jury found verdict for defendant doctor but Supreme Court awarded new trial on the grounds of improper instructions and exclusion from jury of certain evidence offered by plaintiff.

In connection with the admission of lay

testimony in a malpractice case the Court said:

"It is true it has been said that no verdict affirming malpractice can be rendered in any case without the support of medical opinion.

* * *

"Rightly interpreted and applied, the doctrine is sound. Opinion evidence must be founded on expert knowledge.

* * *

"When the standard of care, that is, what is in accord with proper medical practice, is once established, departure therefrom may, in most cases, be shown by non-expert witnesses.

"Here the plaintiff, in the type of evidence offered, has met the test. What the approved practice and the approved treatment are under the circumstances disclosed by plaintiff's evidence, as well as the probable cause of death, have been established, at least *prima facie*, by expert testimony. Failure of the physician to follow the approved practice and administer the approved treatment with ordinary care and diligence is made to appear by lay testimony."

(67 S. E. 2d 61)

SOUTHWESTERN REPORTER

(Contributed by Robert M. Weh of the firm of Burgess, Fulton & Fullmer, 1250 Terminal Tower Bldg., Cleveland, Ohio)

In *Gresham v. Ford*, 241 S. W. 2d 408 (Tenn. 1951), plaintiff recovered a judgment for malpractice. She had gone to the defendant physician telling him she thought she had a broken needle in her arm as a result of numerous injections she had previously had. She told the defendant that she wanted an x-ray and did not want to be operated on. The defendant, however, upon finding that there was a small lump in the arm, told her that it needed attention and proceeded to perform a minor operation under local anesthesia. He did not find any needle, but removed some tissue. Sometime later at plaintiff's insistence, the arm was x-rayed and a broken needle appeared in the x-ray plate, which needle was subsequently removed. Also, testimony was given to the effect that where the complaint is localized to the outer surface, the practice of probing is followed by doctors as a proper method. The Supreme Court in reversing the case and dismissing the complaint, said that while some testimony established that x-ray was perhaps the best test, nevertheless "the course followed by Dr. Gresham was a proper course, and one advocated by many of the doctors in good standing in that community," Page 410, and further at Page 411, quoting from a Pennsylvania case, said:

"Where competent medical authority is divided, a physician will not be held responsible if, in the exercise of his judgment, he followed a course of treatment advocated by a considerable number of his professional brethren in good standing in the community."

In *Nicodeme v. Bailey*, 243 S. W. 2d 397 (Texas 1951), the plaintiff recovered a judgment against the defendant chiropractor. She sought his services in connection with a pain in her neck and defendant evidently without taking any further history or making any real diagnosis, proceeded to give her a manipulation and obtained a bad result. There was no evidence offered that a proper history or diagnosis would have contradicted the manipulation given. The case was reversed and a new trial granted, the court saying at Page 400:

"unless the diagnosis pursued to the extent indicated in Special Issue Number 1 would have indicated that the treatment was dangerous or unnecessary, the failure to make same could not be the proximate cause of the damage,"

and further at Page 401:

"Bad results from a treatment are not, standing alone, sufficient to brand such treatment as malpractice."

"To warrant the finding of a civil malpractice there must be expert medical testimony to establish it and to establish the additional fact that death resulted from such malpractice (quoting from another Texas case)."

Two M.D.'s testified in the case, but the court did not decide the question of whether defendant's treatment could be judged on the basis of proper practice among physicians.

SOUTHERN REPORTER

(Contributed by M. L. Mershon of the firm of Evans, Mershon, Sawyer, Johnston & Simmons, Miami, Florida)

No cases under "Lawyers" or "Doctors."

Hospitals

Palmer v. Clarksdale Hospital (Supreme Court of Mississippi, decided March 19, 1952), 57 S. (2d) 473. Jury verdict in favor of the Hospital and the Superintendent thereof affirmed on appeal.

Plaintiff-appellant claimed to have sustained injuries during the course of an operation by the alleged negligent placing of heavy canvas straps to the feet and ankles of appellant so as to cut off circulation, and gangrenous sores developed on the outside of the heels of appellant's feet, causing her injuries. First of all the court removes the defense of a charitable institution by referring to its recent decision in *Mississippi Baptist Hospital v. Holmes, et al,* 55 S. (2d) 142. Plaintiff's evidence tended to show that she entered the hospital for two operations, neither of which had any relation to her feet which she claimed were perfectly normal; that the operations lasted about 45 minutes and her feet were suspended in straps without the straps being released. She was returned to her hospital room and a private nurse came on duty. This nurse testified that when the anesthesia began to wear off appellant complained of her feet hurting. She also said they were cold, and the nurse applied a hot water bottle. The special nurse further testified that the hot water bottle was not hot enough to burn and was also wrapped in a turkish towel. She did admit, however, that she had known hot water bottles to cause burns. Apparently about 12 hours later plaintiff's feet were found to have bluish spots about the size of a half a dollar in the identical location on the outside of each heel; that these spots became blisters and developed into gangrenous sores. The operations were a success and but for the trouble with appellant's feet she would have recovered in 10 days or two weeks. Appellant introduced as a witness one doctor who testified that if all other causes were excluded he would say that the straps caused appellant's injury.

The proof for appellees showed that the straps were standard equipment generally used in reputable hospitals by surgeons of recognized standing; that there was only one way to apply the straps and they could not be tightened, loosened or adjusted after being applied; that they were applied by a competent, experienced trained nurse, the Superintendent; that no injury had been known to result from the use of such straps, and in the opinion of the doctors testifying no injury from the straps was reasonably anticipated or foreseeable; that the straps did not cover the affected areas of her heels; that appellant's skin was very tender; that hot water bottles will and have caused burns; that appellant's witness, the doctor, stated to the private nurses that appellant's injuries were caused by a hot water bottle. None of the doctors expressed the opinion that the straps caused the injuries except the one who testified for the plaintiff, and he based his opinion on the assumption that all other causes could be excluded. He did, however, deny telling the private nurses that the hot water bottle caused the trouble. The attending physicians, it is interesting to note, were offered by appellee as witnesses but were not permitted to testify upon appellant's objection under the privileged communications statute.

The case having previously been before the Supreme Court of Mississippi on a directed verdict which apparently had been reversed (*Palmer v. Clarksdale Hospital, et al,* 40 S. (2d) 582, 586), the trial court denied the motion for directed verdict. The appellant complained of instructions to the jury to the effect that the defendants were in nowise responsible for the acts of the private nurses, and also that if the jury found that the injuries came from a hot water bottle it was the jury's duty to find for the defendants, arguing that there was no evidence to sustain such instructions. The instructions, however, were sustained by the Supreme Court.

It is interesting to note also that the trial court refused to permit cross-examination of a witness, Mr. M. C. Boyle, that the insurance firm of which he was a member represented the insurance company which carried the liability insurance of the appellee hospital. This was offered by appellant to prove the bias, motive and interest of the witness. While the court stated that ordinarily it is competent to show the bias of a witness as affecting his credibility, the testimony of the witness Boyle had been directed solely to the question of whether

or not the appellee hospital was a charitable institution, and since this question was wholly eliminated from the case by an instruction requested by and granted to appellant, the credibility of the witness on that issue ceased to be material and therefore the ruling of the trial court, whether right or wrong, did not constitute reversible error.

Suwannee County Hospital Corp. v. Golden, et al (Florida, decided February 12, 1952) 56 S. (2d) 911. The court held that a paying patient in a county hospital is entitled to the same protection and same redress for wrongs as if hospital were privately owned and operated, and may not be divested of constitutional rights by statute immunizing hospital from liability for its negligence, though hospital corporation is called "non-profit" and its net earnings are to be placed in its reserve fund and used for hospital purposes. The court held that evidence showed that plaintiff's burns were caused by the use of uninsulated hot water bottles.

Respectfully submitted,
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Report of Marine Insurance Committee

YOUR Committee in its Mid-Winter Statement recited that it would report on:

(1) the decision invalidating the "both to blame" clause, and

(2) possible effect, if any, of the adoption on the admiralty side of the Federal Rules of Civil Procedure.

Decision Invalidating the "Both to Blame" Clause

In the Mid-Winter Report we, of course, had reference to the decision of the Second Circuit invalidating the "both to blame" clause of a bill of lading issued by an ocean carrier which requires cargo owners to indemnify the carrying ship for any amounts the carrying ship loses because damages recovered by the cargo owners from a non-carrying ship are included in the aggregate damages divided between the two ships.

The lower court in an opinion by Judge Medina (*United States v. Atlantic Mutual Insurance Company*, 90 F. Supp. 836) declared the clause valid. The effect of the decision was to deprive cargo owners of 50% of the amount they received from the non-carrying ship for damage caused to cargo thus increasing the cargo owners' insurance cost. The case then went to the Second Circuit which held the clause invalid as we noted in our Mid-Winter Report (191 F. 2d 370). Since then the Supreme Court of the United States has affirmed the Second Circuit (Advance Opinions, October term, 1951, page 569). The clause was held invalid as being in violation of Section 3 of the Harter Act as substantially re-enacted in Section 4 (2) of the Carriage-of-Goods-By-Sea Act. The substance of both statutes is that neither the carrier nor the ship shall be responsible for loss or damage resulting from negligence of the carrier's servants or agents in the navigation or management of the ship. The effect of the decision was to strike down a long accepted practice, not only by the ship owner, the cargo owner, but also the Underwriters. The real effect of the decision cannot be determined until Congress has indicated whether or not it will respond to the movement now before it for enactment of legislation validating such a stipulation.

Federal Rules of Procedure on the Admiralty Side

The possible effect, if any, of adoption on the admiralty side of the Federal Court of the Federal Rules of Civil Procedure.

* * *

This subject has become a delicate one in view of attitudes expressed informally and formally by some of our Federal

Judges. Generally your Committee feels the mass adoption of the Federal Rules of Civil Procedure will not answer the many problems confronting the courts with respect to reaching a just result and a speedy dispatch of litigation consistent with the proper expense. Your Committee believes that the Admiralty Bar should formulate such rules of advancement in its procedure as are necessary and that this should be done with a realization that the Admiralty Rules should be revised, but that they should be revised with the thought of curing defects and particular situations rather than rules for rule sake. In connection with this question there has come to the attention of the Committee a suggested bill, namely, H. R. 5695 which reads as follows:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel, including merchant vessels, tugs, or barges owned by the United States, which comes within the special maritime and territorial jurisdiction of the United States (as defined in Sec. 7 of Title 18, United States Code), the trial of all issues of fact shall be by jury if either party demands it."

The purpose of this statute is to grant to either party a jury trial upon demand. While it is not clear that such a case would partake of the trial on the law side of the court, that is exactly what would happen in which event the Federal Rules of Civil Procedure would be applicable. H. R. 5695 was opposed by various parties throughout the country. At the hearings in Washington it developed that the Marine Division of the Department of Commerce had gone on record as opposed to it as was the Navy. The Department of Labor went on record in favor of it as we interpret its report. The matter will receive no favorable action in this session of Congress. It is thought that eventually Congress will enact legislation which will permit seamen to file maintenance and cure claims on the law side of the court with a jury. This would present, however, a difficult situation, inasmuch as the diversity statutory requirement appears to be pointing upwards.

Respectfully submitted,
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Report of the Practice and Procedure Committee

THE TRIAL OF INSURANCE CASES

Foreword

THE following report of the Committee on Practice and Procedure of the International Association of Insurance Counsel is not intended as an exhaustive discussion or text book on trial tactics. It is rather a collection of suggestions gleaned from the experience of the members of the Committee in the trial of insurance cases. In view of the many differences in the laws of the several states, particularly with respect to procedure, no doubt some of the discussion may be entirely irrelevant to practitioners in some states. Unquestionably some of the suggestions may also be quite controversial. However, it is hoped that the report will be of interest, and possibly helpful, to the members of the Association.

The subject has been divided into several topics which in general have been treated individually by members of the Committee and to a certain extent edited by the chairman and vice-chairman in the interest of coherence and readability. Inasmuch as time did not allow all of the members of the Committee to review all of the papers submitted, the report should be considered not as definite recommendations of the entire Committee but merely as a series of suggestions for consideration and discussion by the members of the Association.

Preparation for Trial

There are two very important periods in the prepartion of any case for trial. The first is the initial investigation period and the second is that period when the attorney and adjuster know from the condition of the court calendar that the case will be reached for trial or when the case has actually been set for trial.

There should be very close cooperation between the attorney and the adjuster from the time the case is first reported, especially in those cases where it appears that suit is inevitable. I am sure that all attorneys representing insurance companies are glad for the adjusters to confer with them concerning cases that may eventually reach the attorney for defense, and if the adjuster will discuss the case with the attorney, even in the early stages of the investigation, a much better investigation can be made and preparation of the case for trial will actually commence with the initial investigation.

This does not mean that each case is investigated with the idea that a lawsuit will result or that the company will defend a case regardless of the facts, damages or demands, but it will assure a proper investigation and preparation.

While some few attorneys desire, and in some cases insist, that the company upon turning the case over to an attorney leave the further handling entirely up to the attorney, experience indicates that most attorneys prefer that the adjuster continue to work closely with the attorney, even through the trial of the case.

Of course, after a case has gone into suit then any activities on the part of the adjuster or the attorney with regard to settlement or contacts with the plaintiff's attorney must be carefully considered. At that stage it should be definitely agreed who will handle the contacts with the plaintiff's attorney and probably in most instances the defense attorney should be the one to do that. However, in many instances the adjuster may be able to make a better settlement than the attorney and in many instances the attorney may be able to make the better settlement. Whether the attorney or the adjuster will handle the negotiations and contacts with the plaintiff's attorney depends to a large extent upon the circumstances and facts of the individual case and the attorney or attorneys representing the plaintiff.

An attorney's time is valuable (opinions to the contrary notwithstanding) and, therefore, the adjuster should be responsible for that sphere of the preparation which includes interviewing and taking statements from witnesses and assembling other factual data. The attorney should secure maps and other physical exhibits and should arrange for medical examinations and reports. If the attorney does this, then the person performing those services can send his bill to the attorney and the attorney can pay it so that insurance may be kept out of the case as much as possible.

In those cases where the adjuster does arrange for medical examinations and reports and secures maps and other physical exhibits, he should have an arrangement with the defense attorney whereby persons performing these services will bill the attorney and the adjuster in turn will reimburse the attorney.

After the initial investigation is made (and the adjuster is responsible for the initial investigation), when it is determined that a lawsuit will result or a suit has been filed, then the adjuster should arrange for interviews between the attorney and the insured, as well as all witnesses.

Thereafter, where the trial of the case will be delayed for any length of time, the adjuster should make periodic contact with the witnesses, the insured, and other persons whose testimony will be needed at the trial.

Even though there is close cooperation between the attorney and the adjuster throughout the entire case and even though the adjuster has made all investigation up to the date the case is set for trial, the attorney is responsible for the actual preparation immediately preceding the trial date. Certainly the attorney is the one to take depositions or to arrange that the depositions be taken, and while the attorney may call on the adjuster for assistance, experience indicates that much better results are obtained where the attorney is actually in charge of the final preparation for trial and actually prepares the case himself.

Motion Strategy Before Trial

A. General: It would be helpful for any trial lawyer to prepare for himself a check-list of motions based upon the practice, procedure and statutes of his own

State. The following is submitted as a preliminary list:

Motion to quash.
Motion for removal to Federal Court.
Motion to dismiss and demurrers.
Motion to make pleadings more definite and certain.
Motion to separately state and number causes of action in separate counts.
Motion to bring in or correct misjoinder of parties.
Motion to strike out unnecessary, scandalous, obscene or frivilous matters.
Examination of adverse parties.
Discovery before trial.
Depositions.
To compel a reply.
Interrogatories.
Admissions.
Bills of particulars.
Notices to produce.
Change of venue.
Continuances.
Summary judgments.

B. When to file: In planning a military operation the first and last element to be considered is the mission of the unit. This would be a good policy to be followed by any trial lawyer in considering the problem of whether to move or not to move. The mission of the insurance lawyer is usually simple. It is either to:

1. Effect a favorable settlement, or
2. Obtain a final verdict and judgment which will be favorable in results or amount or to obtain a final dismissal of opponent's cause.

Any motion should be for the purpose of furthering the reaching of either of these objectives. It may be presumed as a rule that a court will allow the amending of process or pleading at any time. Often the only result of the filing of a motion is to point out to the opponent the weaknesses of his case, your own strategy and to allow him to amend pleadings so as to place him in a stronger position. This leaves the mover with a questionable victory. The danger that the mover will only contribute to the education of his opponent is so great that no motion should be filed unless the petitioner has a definite purpose in mind, or has carefully weighed the advantages and disadvantages and knows beyond a reasonable doubt that a favorable ruling will assist him in attaining ultimate, favorable results.

The extra cost to the client in the preparation for and the hearing of motions should also be considered. It must be remembered that the claims men in the home office were not born yesterday and a statement built up on innumerable motions is likely to be examined with a jaundiced eye.

C. Motion to Quash: As with all motions, this motion should be made only if it will have an ultimate bearing on a favorable final result. Often the quashing of service will result in only a renewal of the suit with further costs to the client and further embarrassment and inconvenience to an insured which will not increase his good will towards his insurer.

This type of motion may be advisable in the following cases:

1. If the Statute of Limitations has run so that the quashing of the service will terminate the suit;
2. If service on the new case cannot be obtained for reason of the absence of defendant from the jurisdiction;
3. If dismissal will require the plaintiff to bring suit in a court which will be more convenient to the defendant.

Upon the receipt of a defense case it is always wise for the attorney to carefully check the date of service, the person upon whom service was made, the place that service was made, and the form of the process and return before entering an appearance. Once it is determined that grounds exist for quashing, then the question as to whether or not the motion should be filed must be considered.

D. Jurisdictional Motions:

1. Removal to Federal Court.

First the grounds for removal must be examined into: that is, amount involved, whether there is a Federal question, residence of the parties or corporations, etc.

If it is determined that grounds do exist for such a removal, then careful attention must be given as to the advantages and disadvantages of such removal. Some of these advantages are as follows:

a. Where the Federal Court sits in a community different from that of the State Court, a removal may take the case away from plaintiff's home where a jury

could be more favorable;

b. It is often found that Federal Court juries are not as subject to local prejudices as State Court juries, but this may vary and every trial lawyer should become acquainted with the idiosyncrasies of the various juries, either by experience or inquiry;

c. Under Federal rules a case may be removed to another district court for the sake of convenience;

d. If the State Court does not have liberal discovery rules, advantage may be taken of the broad rules of discovery in the Federal Courts.

Disadvantages for such removal:

a. Sometimes Federal Courts meet in large metropolitan areas and draw the bulk of their jurors from a large city and thus may be more liberal in verdicts than a smaller community;

b. It may be to the disadvantage of the defendant to subject himself to broader discovery procedures;

c. The defendant may not want to subject himself to the possibility of a removal to another district court under the Federal Rules.

2. Change of Venue.

The local statutes, facts and advantages and disadvantages must be carefully weighed before filing a Motion for Change of Venue. Many of the considerations set forth above relating to removal to the Federal Court would also apply in the case of a motion for a transfer within the State System.

E. Motion for Security for Cost: In most jurisdictions, unless the plaintiff is a non-resident, the mover is faced with the dilemma that the filing of a bond for security for cost is only required if the plaintiff is uncollectible, but if the plaintiff is destitute and is unable to obtain a bond, then the court allows him to go ahead regardless. Thus, the result is merely to build up costs and fees against the client.

If, however, the filing of a bond is mandatory on motion, such as where the plaintiff is a foreign corporation or a non-resident, such a motion should be filed as a matter of course as the necessity for filing such a bond or the presence of such a bond may act as a deterrent to a plaintiff with a weak cause of action.

F. Motions to Clarify Pleadings: A prerequisite for filing such a motion is a careful examination of the opponent's pleadings. Again, the attorney must carefully determine whether the result will clarify the case for himself or for his opponent.

In Federal Courts and in many State Courts the same results may be obtained by discovery proceedings or by the request for a Bill of Particulars.

G. Motions to Dismiss: On these motions especially careful consideration must be given to the disadvantages of filing. Not only is there the danger of educating the opponent, who may easily amend his pleadings to his advantage, but there is the further danger that in the arguments the court may, in its anxiety to give the plaintiff his day in court, pass down a decision which will assure to the plaintiff the right to go to the jury. Such an opinion would also give the plaintiff more confidence in his case and make settlement difficult or impossible.

H. Motions for a Bill of Particulars: This is an extremely helpful motion for a defendant, and it would be well for the attorney to always consider the filing of the same, or even to file as a matter of course. This is especially true in State Courts where discovery proceedings are limited. It is often surprising the amount of information that may be obtained on a Bill of Particulars by just requesting it. Not only does this help in the preparation for trial, but it also limits the opponent and in some cases may lead to a favorable settlement.

I. Motion for Summary Judgment: While the Motion for a Summary Judgment usually may be used by the plaintiff in contract cases only, yet there is seldom any limitation insofar as the defendant is concerned in the use of such proceedings. The local statutes must be carefully checked. Such a motion may be of considerable assistance to a defendant in certain cases:

1. It may lead to a favorable settlement. An example of such a situation was where suit was brought for a limited amount and service obtained on a non-resident motorist residing in a distant state. Liability was most questionable, but the expense of bringing the insured with his witnesses across the country was almost prohibitive. A Motion to Dismiss resulted in very strong language by the Court favorable to the defendant, but the court held that there was enough of a question under the pleadings to let the case go to trial. This

opinion was followed by a Motion for a Summary Judgment, which in turn resulted in a settlement for nuisance value.

2. In those states where discovery proceedings are limited and plaintiff's theory is unknown, a defendant may "smoke out" the basis of plaintiff's suit by filing a Motion for Summary Judgment. The plaintiff must then file a counter affidavit setting up the basis for his cause of action. Rather than risk a judgment, he will usually set forth his strongest case. Such a proceeding should only be used when the dangers of disclosing one's own hand has been carefully considered.

J. Motions for Admissions: Motions for Admissions are often helpful in suits on policies where certain documents or letters are in question. Under the laws of many states a demand may be made upon the opposing party to admit or deny the execution of such documents or letters. It is advisable to obtain such admissions in advance of the trial in order that handwriting experts, or other witnesses, may be arranged for if necessary.

K. Examination Before Trial, Discovery Proceedings: Here the State Statutes must be carefully considered. The Federal procedure has been greatly liberalized under the new Rules and every attorney should become familiar with the scope of this type of proceedings.

Where limited examinations are allowed in State Courts the attorney must be careful as to when the request is made. In Michigan, for example, discovery proceedings may be granted before an answer is filed to assist the attorney in the preparation of his answer, but will often be denied after the answer is filed.

Here again the dangers of such examination must be carefully considered. An examination before trial may assist the other side more than your own. You may by your examination reveal your theory and strategy to your opponent, or may even suggest certain strategy to him which he had not previously considered. There is also the danger of perpetuating necessary evidence for the opposing side by the depositions that you take.

Preparation for examination before trial should be as carefully prepared for as the trial itself. If your party or witnesses are being examined before trial, they should be as carefully prepared as they would be for the trial itself.

In examining a witness, it is well to let him talk to his heart's content and to ramble on without interruption. He may reveal something of great value and there is not too much danger involved as you can object to the answer at the time of the trial as not being responsive, or immaterial. On the other hand, your own witnesses should be carefully instructed to answer only the questions asked and not to volunteer extra information.

As a rule, objections are required only at the time of the taking of the examination as to the form of the question. Other objections may be made at the time of trial, if the deposition is used. Thus, objections should be kept to a minimum. On the other hand, if a question is asked on a privileged matter, the answer of which may result in great harm, regardless of whether it is admissible at the time of the trial, it is well to direct the witness not to answer. In such a case, the matter would then be referred to the court to determine whether or not the answer must be given.

At the end of the examination it is preferable to have the witness sign and not to waive the signature, as the presence of the signature may later become very important at the time of the trial if it becomes necessary to impeach the testimony of that particular witness.

L. Declaratory Judgments: This type of proceedings is perhaps of limited value in the trial of insurance cases but may be used to advantage on questions involving the interpretation of policies.

M. Pre-Trial Techniques: This is a new scene in the legal drama which is rapidly expanding. It is usually set up by local court rules and the attorney must familiarize himself with not only the rules themselves but the manner of handling the pre-trial hearings by the individual judges. The pre-trial hearings should be carefully prepared for by the attorney who must determine ahead of time what matters he will divulge at such hearing and what matters will not be disclosed. The pre-trial hearing not only has great possibility but also involves many hazards.

N. Conclusion: In conclusion on this particular section it is again emphasized that before filing any motion, the lawyer must know the law, his case, and have read and re-read his opponent's pleadings. A lawyer must carefully consider the question of whether to file or not to file the motion, having in mind at all times the ulti-

mate mission involved. If he decides to file, the motion should be carefully prepared, served and filed within the time provided by Statute or Rules. Careful preparations must be made for the hearing. Briefs will often be of assistance to the court. It should, however, be kept in mind that, as a rule, the chief question in the court's mind will be whether or not the granting of the motion will assist in the expediting of the trial or the reaching of a correct and equitable verdict or judgment. Therefore, the attorney should be prepared to point out to the court the relationship of the motion to the trial and the exact manner in which the granting of the motion will assist the trial or the reaching of an equitable result.

Selecting the Jury

There is, of course, no panacea or cure-all for many of the ills or miscarriages of justice that result from jury trials, and it is not our thought that we can furnish a surefire guide that will serve the purpose of guaranteeing either an intelligent or a fair jury in every case. If we can promulgate an idea that may be of assistance in leading to a better understanding between the lawyer and the jury, we will have accomplished our purpose.

We believe that a very great majority of all persons are honest, regardless of their stations in life, or their occupation or business; that the percentages of dishonest persons in shipping rooms, factories, among clerical workers or house servants are no greater than are the percentages of dishonest bankers and business executives. It is also our belief that the average juror who understands what his duties are, and who is made to understand why he is called for jury service, will perform such duties faithfully and with such intelligence as he is capable of exercising. If this premise is correct, it necessarily follows that when a juror fails to perform his duty, it is usually because he does not understand his duty or he does not have sufficient intelligence to assimilate the facts and coordinate his thinking in such a manner as to apply the charge or instructions of the court to the facts.

Proceeding upon the assumption that most people are inherently honest and that, if properly instructed as to the duties which they are called upon to perform, they will perform them faithfully, we suggest that in every case the duties of a juror should be fully explained to the members of the jury panel.

In personal injury and wrongful death cases where insurance companies are involved it almost invariably happens that the plaintiff's lawyer will ask a question along the following lines: "Do you, or any member of your family, own any stocks or bonds in such and such an insurance company; or, are you or any of your relatives employed by that, or any other insurance company; or, are you personally acquainted with the claim agent or any of the officers or executives of that company?"

The courts, both State and Federal, throughout the country, have unanimously held that it is improper for a plaintiff's lawyer to tell a jury that the defendant in a personal injury or death action is protected by a policy of liability insurance. Yet, they have held with an almost equal degree of unanimity that it is proper to inquire as to whether any prospective juror owns an interest in the insurance company involved, or is in any way connected with it or acquainted with any of its employees or officials. In view of the fact that every juror who is possessed of sufficient intelligence "to light one eye" understands from the question that the insurance company named is interested in the outcome of the case, it is difficult to reconcile the conflicting rulings of the courts. However, the rulings that questions such as above quoted are proper have become so well established that there seems to be no ray of hope that the courts may be persuaded to rule otherwise. Therefore, it is up to the insurance company's lawyer to make the best of a bad proposition and do what he can to cope with the situation that exists.

Every one of us who represents a liability insurance company is aware of the fact that once the insurance company is named during the *voir dire* examination of the jury panel "the fat is in the fire." We also know that it will do no good to object to the question or to move for the discharge of the panel, or ask for the withdrawal of a juror, and not one trial judge in a hundred will sustain the objection, and not one appellate court in a hundred will entertain a complaint about it. Every lawyer knows that ordinarily, if not always, the sole and only reason for mentioning the name of an insurance company is to convey information to the juror that the company is financially interested in the

outcome of the case, and that if a judgment is returned against the defendant, the company will pay up to the limit of the policy of insurance. In fact, it frequently happens that the amount sued for is greater than the insurance coverage, but that fact may not occur to any member of the jury, and will not be known to the jury, unless they are so advised by the defense attorney. It would be error for the plaintiff's lawyer to mention the amount of the coverage, because the courts will not permit him to tell the jury in so many words that an insurance company is interested or involved! But, after plaintiff's counsel has inquired concerning the interest (which is practically 100% fictitious) of the members of the jury panel, frequently made up of day laborers and men and women "who are not too busy to devote their time to jury service," it is not error for the defendant's lawyer to tell the jury that the insurance company is financially interested in the case, and to inquire whether such fact might influence their verdict. Experience has proved that better results are frequently obtained when that is done. Therefore, realizing full well that we are "setting foot where angels fear to tread," we offer the following suggestions:

Where it has been made known to the jury that the defendant is protected by insurance, the defense lawyer should frankly tell the jury that the insurance company named is interested in the case; that he is employed by the company, and that it will pay his fee; that if medical experts are called upon to testify, the insurance company will pay their charge; that it will reimburse any witness called by the defense for time lost; that in the case of an adverse judgment, the insurance company will decide whether an appeal should be taken or whether the judgment should be paid; that in the case of an appeal the expense of taking it will be borne by the insurance company; that all and sundry expenses connected with the investigation and defense of the action will be borne by the insurance company; and that in addition to the payment of all the expenses mentioned, the insurance company will pay any final judgment that may be rendered against the defendant provided the judgment is not for an amount in excess of the policy, and that if the judgment is for more than the policy limit, the insurance company will pay to the full extent of its liability under the policy.

In addition to imparting the above information, the insurance counsel should explain, in as much detail as the court will permit, the exact nature of a liability policy, and the meaning of liability insurance, being careful to make the jurors understand that the insurance is for the benefit of the defendant and not for the benefit of the plaintiff; that the fact that the defendant exercised foresight to purchase a policy of insurance to protect him against any claim for damages that might arise, for instance from the operation of his automobile, has nothing whatever to do with the manner in which the automobile was being operated at the time of the occurrence which gave rise to the lawsuit.

After the jury has been fully informed concerning the interest of the insurance company, and the meaning of "liability insurance," each member of the panel should be asked individually to pledge himself not to return a verdict in favor of the plaintiff unless the evidence proves that the defendant was negligent, and he should be further pledged not to let the fact that defendant is insured influence the size of the verdict.

It may appear that the procedure here suggested is fraught with danger; perhaps it is. But in the average case the chances of obtaining fair and impartial consideration of the facts by the juror are far greater if that procedure is followed than the chances would be by either objecting to the mention of the insurance company or ignoring it. It may be argued, and logically so, that the procedure which we have suggested has the effect of "letting the bars down," and that plaintiff's lawyer will be permitted to, and probably will, take advantage of the admission of the insurance company's lawyer and, in summing up his case, will argue that the insurance company will bear the expense of the suit and pay any judgment that may be entered against a defendant. However, an effective answer to such argument is to remind the jury of their promsie to decide the case solely on the evidence, and without regard to the fact that the defendant is insured.

To return to our original thought. Most people are honest, and, if properly advised concerning their duties, are willing to perform them honestly. Furthermore, most people who have been properly informed resent an effort to persuade them to depart from the path of duty, and this truism applies to jurors as well as it would

apply to any group of twelve persons. Once a juror has been properly advised, it is not ordinarily necessary to remind him that his obligation to the defendant in a lawsuit is as great as is his obligation to the plaintiff; nor is it ordinarily necessary to remind a juror of his pledge to decide the case upon the facts in evidence, and not because of the interest of an insurance company, but it can do no harm to remind him of it, especially in cases where the plaintiff's lawyer has attempted to appeal to his prejudice or his sympathy after he has promised that he will decide the case on the facts, and after he has been instructed by the court that sympathy and prejudice have no place in judicial proceedings.

Conduct of Trial

The opening statement by defense counsel is probably the least emphasized and at the same time one of the most effective weapons afforded the defense. By opening statement we do not refer to the rather general jury speech which frequently precedes the selection of the jury but to defense counsel's statement as to what he expects to prove, made after the plaintiff has rested his case. Such statement is frequently omitted; and when made is still more frequently just a brief generalization.

Have in mind that to this stage of the trial, the jury has heard testimony only from witnesses for the plaintiff. The defendant's opening statement should arrest the direction of the jury's thinking, and should start it on an opposite course.

Defendant's counsel should be prepared to present a clear, usually chronological, picture of what the evidence will thereafter develop. He can probably best do this by first pointing out that the plaintiff has undertaken to prove 1, 2, 3 things. He can adapt the matters which the plaintiff attempted to prove to the order in which he plans to present his own case. He should be specific as to what the evidence will develop. A carefully prepared diagram or plat is frequently helpful.

Where defendant's evidence will meet the plaintiff's head-on, counsel should have no hesitancy in so stating and in making the issue clear to the jury. We all know that the jury must be convinced that *we* ourselves are convinced. On the other hand, it is important that in his opening statement counsel create an impression of what the *evidence* will show, not what he will show. On one occasion I was startled when, at the close of my opening statement to the jury, one juror, apparently of foreign extraction and not too highly educated, asked me sharply: "Do you got any proof?" I had apparently made the mistake of creating the impression that I was asking the jury to accept as fact what I had been stating. This can be avoided by saying simply that counsel's statements are not to be considered as evidence but that the testimony of witnesses will follow and will speak for itself.

In short, the opening statement gives defendant's counsel an opportunity to stop the direction of the jury's thinking, to enumerate clearly the actual facts which the evidence will disclose, and to create an attitude of expectancy that looks toward a complete repudiation of the plaintiff's case.

Direct examination is an art in itself, much more difficult than cross-examination where the material has just been furnished and where the witness may be led and caught up. Jumping from one subject to another, with whatever pauses are needed or desired, is permissible in cross-examination. But direct examination should tell a smoothly flowing, chronological and convincing story, in which the jury is left with a clear impression, *not* of counsel's question but of the witness's answers.

Preparation is almost the whole story in direct examination. Preparation is almost impossible in cross-examination. In stating that preparation for cross-examination is next to impossible, we do not mean to include the plaintiff himself or the plaintif's doctors. In the latter categories, most careful and complete preparation is essential.

Each item intended to be brought out on direct examination should be gone over carefully in advance with the witness. This witness will thus not only have his recollections formulated clearly in his mind, but by knowing what to expect he will be at greater ease in the witness chair. This ease should be enhanced, of course, by a number of simple preliminary questions which will likely have nothing to do with the case.

Some lawyers can no doubt carry everything in their minds; but I have always followed the practice of dedicating a separate page in my tablet or note book to each witness, and on each such page I list, one under the other, a brief reference, per-

haps only a word or two, to each item of proof I intend to develop from that witness. As the witness takes the stand, I turn to his page; and while I seldom have to refer to it, it is a comfort to have it there. And at the conclusion of the examination, the items can be quickly checked before the witness is released.

As to the order in which witnesses are called, the nature of the case is usually controlling, but, as a rule, I like to use my strongest witness last and my second strongest first. The in-between witnesses fill out the story.

Since most damage suit lawyers will try to harass defense witnesses, expert and otherwise, with questions as to whom they have talked, what compensation, if any, they are receiving, etc., I think most defense lawyers find it best to develop those matters briefly themselves. We all know the unhappy tendency of many witnesses, caught by a question which sounds like a charge, to deny that they have talked to anyone and thus to furnish plaintiff's counsel with material for an attack upon the witness' credibility. On the other hand, the average juror is not going to believe that defendant's counsel will deliberately develop facts which represent any sort of wrong doing.

It is best, of course, to warn your own witnesses not to argue with plaintiff's counsel but to treat the latter with respect no matter how much disrespect he may feel; and above all, not to get mad. The witness should be reassured that the jury is on his side; and if he will make quiet, direct and brief answers, he will keep the jury on his side. In particular, he should never volunteer anything, no matter how much he may think he might help the case.

The privilege of taking the plaintiff's oral deposition before trial (usually soon after the case is filed) is so valuable as to be almost unfair to the plaintiff. With the many months that ordinarily separate the taking of the oral deposition and the trial, even the most honest man would find it difficult to tell the same story twice. The result is even more devastating where the plaintiff is exaggerating or fabricating his claim.

Once taken, the oral deposition should be carefully marked and outlined and should form the basis of much additional investigation, as well as the heart of the cross-examination of the plaintiff. Many cases resolve themselves down to the trial of the plaintiff himself, and each lawyer knows best how he wants to conduct such trial.

For one day at least, the day the witness is on the stand, defense counsel should know more about the medical aspects of the case than the plaintiff's doctor. Many hours of medical study are required for each case; and when the plaintiff's doctor cannot be proved wholly wrong about the plaintiff, he should be shown to know comparatively little about the subject he is trying to "expert." The goal is to cause the jury to lose confidence in him and so to discount his opinions as much as possible. The "professional" medical witness can, of course, be greatly discredited also by his court room record.

Other witnesses to be cross-examined cannot be approached with any set plan. *We* must remember too that the jury is on the witness's side. A witness who is courteous, quiet and gives indication of appealing to the jury should be let go quickly. A witness who is cocky and unappealing to the jury, or whose testimony you can clearly refute, can be handled accordingly. But counsel should never get cocky himself or cause the jury to feel resentful on behalf of a witness.

Most of this is of necessity general in nature. In making his opening statement, in conducting his direct examination and in undertaking to undermine the plaintiff's case on cross-examination, each lawyer must follow tactics which he has found are most effective for him.

After all, all you have to do is win.

Argument or Summation

One cannot overemphasize the importance of the final summation of a case to the jury. This does not mean that the attorney cannot overdo the argument. It merely means that the summation should be prepared and delivered with the utmost care. After all, it represents the culmination of the trial and the last opportunity the advocate has to persuade the jury of the truth and justice of his client's case. Its importance in the framework of the trial should, therefore, never be minimized.

On the other hand, the argument should never be too long. There is probably nothing more fatal to the creation of a favorable impression upon the minds of any audience than a tiresome argument replete

with repetitions and inconsequential details. The attorney should approach the argument not only with the firm conviction of the righteousness of his client's case but with the equally firm conviction that the jury is fair, conscientious and impartial; that the members of the jury have listened to the evidence with attentiveness and open minds and that they are familiar with at least the salient facts brought out during the trial. If the advocate is convinced of these points, he will approach the argument with the further conviction that he is talking to a friendly and responsive group and, therefore, that it is unnecessary to harangue them to the point of exhaustion. Brevity, sincerity, and conviction are, therefore, the cardinal factors of any argument or summation to the jury.

If anything is more fatal to a convincing argument than an excessively long and exhausting harangue, it is an overexaggeration or an outright misrepresentation of the facts. Underemphasis is frequently more convincing in the minds of the jury than extravagant claims. Naturally the evidence favorable to the client should be presented in a convincing manner, but if we assume, as we should, that the jury is familiar with these facts, their exaggeration or unwarranted conclusions drawn from them can only serve to raise a doubt in the minds of the jury as to whether or not they have clearly interpreted the testimony. An utterly fair appraisal of the evidence and the conclusions that may be logically drawn therefrom is, therefore, much more likely to produce a satisfactory result than over-exaggeration or attempted misrepresentation. The latter is, of course, utterly devastating.

Prepartion for the argument should be made in advance of and throughout the course of the trial. It is frequently helpful to make a rough outline of the argument before going into court to commence the trial. During the trial this outline can be developed with notes emphasizing the important facts and issues which are brought out during the taking of the testimony. If this is done, by the time the evidence is all in, the outline will be complete and will need only a little polishing to furnish the basis for a logical and convincing argument.

At the outset of the argument, a candid statement should be made of the issues involved in the case, including not only the issues of fact but the issues of law involved. The jury should be told that the court will instruct them as to the law applicable to the case and, if counsel is positive that the court will give a certain instruction, it is frequently helpful to tell the jury what that instruction will be and how it applies to the facts in favor of your client's position. Of course, if the attorney is not sure that the court will give the requested instruction, it is extremely dangerous to predict what the court will do. It is perfectly obvious that if the court sustains counsel's position, this will serve to strengthen the case, but, on the other hand, if the court disagrees with counsel, the result may be disastrous.

Reading at length from a transcript of the testimony or from depositions is not only ineffective but dull. However, if the opposing party or his counsel should make damaging admissions, it is generally advisable to have the reporter write up that portion of the transcript in order that the jury may be given the exact words. Usually counsel will be more convincing if he uses his own language during the entire argument or summation, and it is only when particular phraseology or the specific language is either vital to the issues or would lend emphasis to the argument that specific reference to the transcript should be made.

The same is true of exhibits, particularly documentary exhibits. Generally speaking, reference to them should be made in counsel's own language, although it is frequently helpful to suggest to the jury that if the matter becomes important, the court will probably allow them to take the exhibits into the jury room. And speaking of exhibits, maps and diagrams where applicable are probably the most effective means of giving the jury a clear understanding of the facts. If prepared maps or diagrams have not been introduced in the case, very often a blackboard can be used to advantage by counsel during the argument in making a clear and understandable impression upon the jury.

The question of whether and to what extent insurance should be discussed depends, of course, upon the nature of the case and the manner in which insurance has been brought into the evidence if at all. In the ordinary automobile accident case, in most jurisdictions, the question of insurance may not properly be brought before the jury. In such cases it is usually advisable for counsel to avoid discussing

insurance at all and to try the case solely upon its merits as if it were a suit between the individual named defendants. On the other hand, in certain cases, such as life insurance cases, the insurance company is a party to the litigation. When this is true, it is frequently helpful for the attorney representing the insurance company to point out that insurance companies do not manufacture money but that they merely collect premiums and pay claims and that the amount of the premiums is dependent upon the number of claims paid. In this manner it can be very forcefully argued that if the insurance company is required to pay an unjust claim, it simply means that the people who buy insurance are required to pay that much more in premiums for their protection.

Frequently in tort cases, a suggestion may be made to the jury that in deciding the question of liability for injuries there is a consideration other than the purely monetary one; that is, the consideration of placing *guilt* on a person. For instance, in a case where suit is brought against a corporation because of the act of an employee, if it is called to their attention that, when the jury awards damages, it is actually accusing the employee of recklessness and negligence and condemning him personally as the one to blame, the jury may not be so prone to be liberal in favor of the plaintiff. Skillfully handled, such an argument is many times a deterrent against the philosophy of "after all it's a big corporation and won't feel the loss."

No lawyer can be really effective in the trial of a lawsuit, indeed, it might be said that no lawyer can win a lawsuit, unless he is firmly convinced in his own mind of the righteousness of his client's cause. The most effective argument is the one which will convey to the jury that conviction, that feeling of righteousness which counsel must have to be successful. In order to attain this result, the attorney should simply be himself. He should be natural and sincere; his tone of voice should be conversational and pleasant yet emphatic. But emphasis is not measured in decibels. In fact, there was one rather well-known and successful trial lawyer who, when he desired to emphasize a point, would lean toward the jury in an attitude of the utmost confidence and speak in so low a tone that the jury also found themselves leaning forward to hear. Forensic ability is, of course, an asset for any trial lawyer but no jury, at least no modern jury, likes to be subjected to flights of oratorical display. In short, the most convincing argument is almost invariably the one which is delivered in a perfectly natural manner and in a conversational tone of voice with the utmost sincerity.

Report of Workmen's Compensation Committee
Rising Costs of Workmen's Compensation

THE huge increase in the cost of workmen's compensation insurance coverage but reflects the large increase in the amounts paid as benefits for death and injuries and for medical services. This increase imposes a heavy additional burden on industry with its tens of thousands of employers and its approximate 45 million workers[1] and on the public which absorbs a large portion thereof. Inflationary trends caused mainly by the depreciated value of the dollar account in part for this increased cost, but the principal cause thereof is the social and political philosophy which underlies some of the recent legislation relating to medical benefits and the administration of workmen's compensation acts.

Workmen's compensation is a *compromise*. At common law an employer was liable to his employee for personal injuries only where he was negligent. Under the

[1]Analysis of Provisions of Workmen's Compensation laws and Discussion of Coverages (Jan. 1952), Chamber of Commerce of the United States.

workmen's compensation acts liability is predicated upon the fact of employment. It was first developed as a system of sickness insurance in Germany under Bismarck's leadership, then was copied and expanded in England, and afterward in this country where the principles thereof were adapted to workmen's compensation and incorporated therein.[2]

The employee might recover in a personal injury action against the employer based on the latter's negligence for pain, suffering, loss of wages, loss of prospective earning power, and medical and hospital bills, if he prevailed, and the amount of the recovery might be large. But, he might not recover at all, and often did not do so, for the reason that there was available to the employer in such actions the defenses of contributory negligence, assumption of risk, and the fellow servant rule. The *compromise* was that the employer on his part would assume liability without fault for the payment to the employee or his dependents of benefits for injuries, death, funeral expenses and medical care, according to a definite plan of benefits for specific cases determined in advance, thereby at the same time giving up the defenses of contributory negligence, assumption of risk, and the fellow servant rule, and that the employee on his part, in order to secure such benefits for himself and his family when they were sorely in need thereof, would accept such benefits in lieu of the uncertain recovery in a common law action for negligence of a verdict for a larger amount. While the employer thus assumed an absolute liability and the employee acquired an absolute right of recovery, the purpose was to impose upon the employer a liability which is both limited and determinate.[3] It is clear therefore that both the amount of the employer's liability and of the employee's recovery should be limited to specific amounts set forth in schedules set up in advance.

The reasons given for the adoption of workmen's compensation, involving as it does such a compromise, were that modern industrial conditions required such a system in order to provide, without expense and delay, benefits to injured workmen and their families and to avoid unduly, costly and tedious litigation. The thought was that the employee and his family were in need of such benefits regardless of whether the employer was at fault. The arguments in favor thereof were that thereby the economic status of the worker would be improved; that the uncertainties, delay, expense and hardship attendant upon the enforcement of common law remedies would be obviated; that the losses to both employer and employee incident to the industry in which they were engaged would be transferred ultimately to the consuming public in greater or less degree; and that thereby the relations between employers and employees would be improved by avoiding or reducing the friction incident to litigation.

In order to carry out the purposes of workmen's compensation the statutes creating such systems provided for the administration thereof. The intention was that the standards set forth in the act should be applied in determining liability thereof.

During the period since workmen's compensation acts were first adopted, a new social outlook has evolved in favor of increased coverage and benefits and an administration thereof resolving all doubts in favor of employees so as to in effect not only award employees' recovery in cases not strictly within the act, but also thereby to expand the coverage and benefits beyond the provisions of the acts themselves.

The amounts and duration of benefits under the act have been greatly increased. At first the workman was given a smaller percentage of his wages as compensation than now. For example, he was given such amounts as 33 1/3 per cent to 50 per cent of his wages, then 60 per cent, then 66 2/3 per cent, and finally even larger amounts. In death cases the acts originally provided for some such amount as $5,000.00, but now the amounts have been increased to $7,500.00, $10,000.00 and in New York State it might even be $30,000.00. The duration of the benefit payments was defined and limited. The definitions and limitations as to amounts to be paid and the duration of such payments were adopted as safeguards to prevent workmen's compensation from being too heavy a burden upon industry. The increases which have been made, represent a long

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[2] *Lewis & Clark County v. Industrial Accident Board*, 52 Mont. 6 155 P. 268, L. R. A. 1916 D 628; 58 Am. Jur. Workmen's Compensation, Sec. 2, N. 7.

[3] *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145; 76 L. Ed. 1026; 52 S. Ct. 571, 82 A. L. R. 696.

departure from the amounts originally set up as sufficient. On top of that, the social concept reflected by the decisions of referees in certain states has expanded that liability and has sometimes resulted in the administration of the system as if it were a pension and not a liability system.[4] The question now is how far such increases can go without rendering the entire system too burdensome to be sustained by our industrial system.

The attitude of administering workmen's compensation acts has resulted in benefits being extended in many doubtful cases, as for example in case of heart disease,[5] traumatic neurosthenia, neurosis or backache cases.[6] The tendency to increase workmen's compensation coverage by decisions favorable to employees is illustrated by the case,[7] which are but examples of the present day trend.

The increased cost of medical benefits has been very great. Originally, many of the workmen's compensation acts contained provisions allowing specific amounts for specific injuries for specified periods of time.

Thus there was limitation both as to amount and the duration of the payments. On the whole this worked very well. There were some exceptional cases, where additional benefits uncertain in amount were authorized, but specific provisions could have been enacted to cover them and in some cases that was done. In recent years in many states medical benefits were made unlimited both as to amount and as to time.[8] The results of removing limitations as to amount and time have been important factors in increasing costs. For example, in *Fehland v. City of St. Paul*, 215 Minn. 94, 9 N. W. (2d) 349, the employee was injured on December 24, 1929, and immediately hospitalized. He remained in the hospital, except for a few days, until shortly after July 26, 1932, after which he lived in private homes until April 25, 1936, where he received care because of his injured condition. On that date he fell and was again injured and was again hospitalized until January 3, 1941, when he went to live in a private home where he received care and remained until his death on March 13, 1942. The employee was awarded benefits to cover the hospital and medical care and the costs of his living expenses in the private homes during the entire period from December 24, 1929, to the time of his death on March 13, 1942 —a period of twelve years and four months. The award was affirmed by the State Supreme Court upon the ground that there was evidence to support the findings made by the Industrial Commission which administers the Act in Minnesota. That case illustrates a type of case which has become quite common.

Compensation insurers, the same as other insurers, should and do operate on an actuarial basis in order to compute what risks may be undertaken for a given premium. While it is said that the basis for an actuarial computation is a compound of experience and mathematics, in practice it is no mere mathematical computation. There is no magic formula or magic rule process for setting up an insurance reserve. The process involves the exercise of judgment based on broad experience. In each case the judgment of local claims personnel who are familiar with local conditions, as well as the experience of the home office, are considered. Where the amounts of the medical benefits and duration thereof are determined by fixed schedules, the actuarial computation can be made with safety and perhaps with almost

[4] In *Pelchlin v. Fairmont Railway Motors*, 180 Minn., 411, 230 N. W. 897, the court said: "The compensation act is not a pension act."

[5] See: A study of Workmen's Compensation and Heart Disease in New York City, by Leonard J. Goldwater, M. D., and Naomi W. Weiss, M. S.; Vol. 51 New York State Journal of Medicine No. 23.

[6] The National Underwriters, Dec. 27, 1951.

[7] *O'Leary v. Brown-Pacific-Maxon, Inc.*, 71 S. Ct. 470, decided by the United States Supreme Court on February 26, 1951. Rescue attempts by employees are not neecssarily excluded from the coverage of the Longshoreman's and Harbor Workers Act and it is a question of fact as to whether or not a particular rescue attempt is one of the class covered by the Act. If the evidence fairly supports a finding that an employee who was waiting for a bus on shoreline recreational facilities maintained by the employer acted reasonably in attempting to rescue two men stranded on a reef by swimming in a treacherous channel, where swimming was prohibited, a death benefit award will be sustained. The rest of recovery is not a causal relation between the nature of the employment and the accident. It is not necessary that at the time of the injury the employee be engaged in an activity of benefit to his employer. All that is required is that the obligations of employment create a "zone of special danger" out of which the injury arose and a reasonable rescue attempt may be one of the risks of employment and therefore covered by the Act.

[8] *Kummer v. Mutual Auto Co.*, 185 Minn. 515, 241 N. W. 681.

mathematical certainty; but, where there are no limits as to either amount or the duration of the payments, the factors with respect to which judgment must be exercised and upon which the computation must be made are so lacking in certainty as to make the determination of a reserve much more difficult. The difficulties are illustrated by the spinal injury cases, referred to below,* taken from the files of a large insurer in this field, the names of the employees and their employers are omitted, but the facts are stated as they appear in the files relating to particular cases. These cases illustrate how increased awards of benefits, which were uncertain as to both amount and duration and thus incapable of ascertainment at the time of underwriting, have increased the amounts of the reserves needed to provide funds for the payment of such benefits. The amounts of such reserves are not only enormous, but also catastrophic. Where a reserve of $50,000.00 formerly was adequate, one, ranging from $100,000.00 to $500,000.00, and even more, is now needed because of the increased cost of workmen's compensation. Students of the subject have said that the new miracle drugs have prolonged the lives of many injured workmen so as to prolong the benefit payments, and in some cases there is no end to the liability except death. In addition to the uncertainty as to the amounts to be paid, it is difficult for the insurer to know when or whether it has realized a profit on its business. As said in the December 27, 1951, issue of The National Underwriter:

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*1. Employer-electric company — Employee inj. 4-6-30 Age 40, complete paralysis from hips down.

Date	*Medical Reserve*	*Basis*
Original	$20,000.00	
12-20-39	25,000.00	
11-14-44	40,000.00	Life expectancy at $1200 per annum.
8- 5-48	50,000.00	Life expectancy at $1700 per annum.
1-28-49	55,000.00	Life expectancy at $2000 per annum.
7- 2-51	65,000.00	Life expectancy at $2500 per annum.

This injured has and remains in the home for incurables. The monthly rate has increased from $100 to $115 on 3-1-47, to $120 on 3-1-48, to $140 on 1-1-49, to $150 on 7-1-50, to $165 on 7-1-51.

2. Employer—motion picture producer. — Employee inj. 11-13-44 Age 34, paralysis of both legs.

Date	*Medical Reserve*	*Basis*
4- 8-46	$30,000.00	One-half of life expectancy at $2200 per annum.
12- 8-47	50,000.00	75% life expectancy at $2200 per annum.

The above injured is at his home, being cared for by his wife, who is being paid $35 per week.

3. Employer—theatrical company — Employee inj. Dec. 1944 Age 43, neck injury followed by hysteria and neurosis.

Date	*Medical Reserve*	*Basis*
Original	$ 5,000.00	
1- 9-51	22,000.00	Life expectancy at $1000 per annum.
12-31-51	35,000.00	Life expectancy at $1700 per annum.

The above injured is now at his home being cared for by his wife, who is being paid $25 per week.

4. Employer—Stevedoring company. — Employee Inj. 10-30-45 Age 35, paralyzed from the waist down.

Date	*Medical Reserve*	*Basis*
1-29-47	$ 21,000.00	Life expectancy at $1000 per annum.
8- 2-48	$56,000.00	Life expectancy at $1450 per annum.
12-31-49	126,000.00	Life expectancy at $5200 per annum.

The above injured has been in and out of many hospitals and rehabilitation clinics. He is at present at home being cared for by his wife, who is being paid $30 a week.

5. Employer—day school — Employee inj. 4-17-48 Age 46, paralysis of the arms and legs, but showing improvement.

Date	*Medical Reserve*	*Basis*
8- 6-47	$ 12,500.00	
9-16-47	18,000.00	
4-19-48	25,000.00	
8- 4-48	35,000.00	
2-11-50	120,000.00	Life expectancy at $4400 per annum.

The above injured is at his home taking exercises under medical direction, being cared for by his wife, who is being paid $70.00 per week.

6. Employer—contractors — Employee inj. 7-10-50 Age 53, quadriphlegic, paralysis of both arms and both legs.

Date	*Medical Reserve*	*Basis*
10-25-50	$ 5,000.00	
2- 1-51	$100,000.00	3½ years at $27,500 per annum.
12- 4-51	$150,000.00	10 years at $13,500 per annum

The original diagnosis on the above case was that the injured could not survive. For approximately a year the medical expense including three nurses approximated $550 per week. Recent medical expense, approximatly one-half of that amount, including one nurse.

"But the reinsurer is afraid to pull down any of its W. C. income. On the contrary, the impulse is to put it in reserve and hang onto it until the shock loss cases on its books today are closed out. A $200,000 underwriting profit in 1950 is not going to be profit in 1970 or 1980 if the per item cost of medical is up 20 per cent 20 or 30 years from now. If this rise in cost, over the life of the big case, is an average 10 per cent, the effect is easy to see: 10 per cent of $300,000 is $30,000. Cut the $30,000 in half, to be conservative; $15,000 must be multiplied by the number of cases now on the books—one re-insurer has 25 of them; another has 15 and so on."

The increased cost of medical benefits and the difficulties of administering them according to actuarial standards has raised a very serious question in the minds of a few insurers as to whether or not they should entirely withdraw from the workmen's compensation insurance field. Precedent for such a withdrawal is found in the experience of insurance companies discontiniung the writing of unlimited non-cancellable health insurance. Such insurance is not unlike underwriting payment to an injured workman of hospital and medical benefits for the rest of his life.

The increase in benefits for injury and for death and the unlimited medical benefits with the huge increase in costs represented thereby is really a departure from the compromise under which the workmen's compensation system came into existence. This departure has resulted in a steady shift of the burdens and costs of workmen's compensation to the employer so that the employer bears a burden so increased as to be out of all proportion to what the proponents of workmen's compensation ever contemplated. So far as increased medical expenses are concerned, the employer's situation under unlimited medical benefits is no different than it was under the common law system, except that under the workmen's compensation system the employer has no chance of defeating such allowances by setting up the defenses of contributory negligence, assumption of risk and the fellow servant rule. In fact he is worse off in this regard than he would have been if the employee had been permitted to recover such benefits in a common law action even if there were liability without fault, for the reason that in such cases the verdict of the jury would set a ceiling on the amount to be paid, whereas under the workmen's compensation law the employer cannot even make a settlement with the employee and the amount of the payments remains open so long as the employee lives.

As a practical matter there are limits to the extent to which industry can absorb, as part of business expense, the cost of workmen's compensation. There are limits also to the extent to which an employer can shift the cost of the workmen's compensation to the consumers of his products. For example, as Mr. Solon J. Stone pointed out in "The Cost of Workmen's Compensation," an address delivered before The Self-Insurers Association in New York, on December 13, 1951, the employers of one state are competing with those in other states. For example, he points out that the cost of workmen's compensation in Pennsylvania is 27.6 per cent as high as it is in New York. Consequently, the manufacturer of shoes or farm machinery or any other article in New York is at a disadvantage in competing with similar manufacturers located in Pennsylvania. In other words, the employer in a high cost workmen's compensation state is at a very marked disadvantage in competition with one in a low cost workmen's compensation state. It has been demonstrated that the cost of production is a very vital factor in determining the location of a business enterprise and its ability to earn profits. One of the reasons that states such as Massachusetts, New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois have attracted so much industry is that not only cost of production but also low freight rates to the sources of raw material and to the markets for manufactured products have been so low that manufacturers located there had advantages over those located elsewhere in that they can produce and ship at prices that other manufacturers cannot meet. In some cases the margin has been very small indeed. If the margin is wiped out, the employer must find a more favorable environment in which to operate his business and move there. Industry has been on the move in America—it has gone from places where it has not been able to make a profit to those where it could. If workmen's compensation becomes so costly that particular employers cannot afford to pay it, it also may be a factor that will induce

industry to change its location and go places where the cost thereof is less in order to make a profit.

Many suggestions have been made to deal with these problems. It has been suggested that changes be made in the substantive laws by amending workmen's compensation acts so as to set up more definite standards for measuring liability both for compensation for injuries and the amount of medical benefits. In this connection it has been proposed that the amounts be made as definite as possible and limited as to duration. It has been suggested also that the administration of workmen's compensation laws be changed by the more careful selection of personnel to administer such laws and to enlarge the court review of workmen's compensation cases so that there would be review of the facts as well as of the law. Under existing laws, there really is no judicial review of the facts with the consequence that many findings awarding compensation are permitted to stand, which would be set aside if the courts were authorized to review the facts as well as the law. It has also been suggested that special workmen's compensation tribunals be created, having highly qualified personnel and staffs receiving adequate compensation for their services. For instance, Mr. Stone, in his paper above referred to, advocates the creation of a workmen's compensation court consisting of five judges, who shall be able lawyers, and having the power to review both the law and the facts in such cases. He recommends that the salary of the judges be fixed at $25,000.00 in order to attract the services of men of high ability and character. It might be well if such judges had long terms and were not eligible for reappointment or re-election in order to insure their absolute independence.

And finally it has been suggested that the public be informed as to the problems confronting insurers and industry to the end that it reconsider the entire problem and redetermine what is fair and just and what it is willing to pay for what it regards to be such. After all, the problem is not one solely of the insurers, but is rather one of the entire public for whom insurers carry the risk. But, it is the employers in the first instance and the public afterward which pays this cost. Knowledge and appreciation of the facts and cooperation of all affected by workmen's compensation are needed and urged.

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